

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN PEDROTTI : DETERMINATION
 : DTA NO. 820993
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 September 1, 1998 through August 31, :
1999.

Petitioner, John Pedrotti, 2714 Evans Road, Oceanside, New York 11572, 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 September 1, 1998 through August 31, 1999.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 14, 2006, at 10:30 A.M., with all briefs to be submitted by February 16, 2007, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael J. Hall, Esq., of counsel).

ISSUES

I. Whether petitioner was personally liable for the sales and use taxes due on behalf of Universal Auto Leasing, Inc., as a person required to collect and pay such taxes under Tax Law §§ 1131(1) and 1133(a).

II. Whether penalties imposed by the Division of Taxation should be abated.

FINDINGS OF FACT

1. During the summer of 1997, John Pedrotti (“petitioner”) was working as a salesman for Messrs. Arie Ettinger and Haim Goldenberg at a used car lot located at 58-10 Queens Boulevard, Woodside, New York. This used car lot was operated by ILN Leasing, Inc., d/b/a Majestic Motors. Petitioner had worked as a salesman at this used car lot since 1994. This was petitioner’s first employment in the automobile business. Petitioner was a high school graduate who did not attend college.

At some point after petitioner was working at this lot, Messrs. Ettinger and Goldenberg asked him to meet with them at their new location at 52-01 Queens Boulevard, Woodside, New York. It was explained to petitioner that Messrs. Ettinger and Goldenberg had purchased this property and petitioner was offered a job as a salesman at the new location. Petitioner was told that the lot at 58-10 Queens Boulevard was going to be closed and that if he did not accept employment at the new location under the terms set forth by Messrs. Ettinger and Goldenberg, he would no longer have a job.

As part of the terms of his new employment, petitioner was asked by Messrs. Ettinger and Goldenberg to sign on behalf of the business as a corporate officer because he was informed that since they owned the property, Messrs. Ettinger and Goldenberg could not own the New York State Department of Motor Vehicles (“DMV”) license. As an incentive to get petitioner to agree to the terms set forth by Messrs. Ettinger and Goldenberg, he was offered a base salary of \$300.00 per week plus a commission of up to \$100.00 per car sold. Previously, petitioner did not receive a commission on every car sold at the lot. Petitioner did not contribute any money to the business.

2. Complying with the wishes of his employers, petitioner, on July 22, 1997, filed an Original Facility Application with the DMV and signed the application on behalf of Universal Auto Leasing, Inc., d/b/a Majestic Motors¹ as the president, secretary and treasurer. On July 23, 1997, petitioner filed a Basic Premises License Application with the New York City Licensing Center, Department of Consumer Affairs, signing the application as the president.

An Assumed Name Certificate was filed by petitioner on July 24, 1997 with the New York State Department of State on behalf of Universal Auto Leasing, Inc., which was the name of the corporation (it did business under the name of Majestic Motors) which operated at the 52-01 Queens Boulevard location.

An Application for Registration as a Sales Tax Vendor (form DTF-17) was filed on June 20, 1998 by petitioner who indicated on the form that he was the president of Universal Auto Leasing, Inc.

3. In addition to filing the necessary applications with the appropriate governmental entities, petitioner also opened a bank account on behalf of the business at the Chase Manhattan Bank, 47-11 Queens Boulevard, Long Island City, New York. This account was used to pay the monthly expenses of running the lot.

4. Petitioner's job duties were as follows: opening the business daily; working Mondays through Saturdays from 9:30 A.M. until 7:00 P.M., or closing; preparing applications for the financing of vehicles by customers; taking cars for inspections or to have miscellaneous work performed; delivering cars to customers; and accepting payment from customers for cars sold.

¹ As indicated in Finding of Fact "1", Majestic Motors was the name of the business operated by Arie Ettinger and Haim Goldenberg through their corporation, ILN Leasing, Inc., at 58-10 Queens Boulevard and again when Universal Auto Leasing, Inc., began operating at 52-01 Queens Boulevard. Unless otherwise noted, all references to Majestic Motors shall refer to the Universal Auto Leasing, Inc., operation at 52-01 Queens Boulevard whose sales are the subject of this proceeding.

The business at 52-01 Queens Boulevard consisted of a used car lot with a trailer thereon. Inside the trailer were two desks; there were never more than two or three employees.

5. All monies taken in by the business, whether paid by cash, checks or credit cards, were turned over to Arie Ettinger. Petitioner was paid by Arie Ettinger on a weekly basis; he was paid in cash on Monday morning for the prior week. In the event that Mr. Ettinger was away, Mr. Goldenberg would come to the lot and pay petitioner's salary and commissions. Petitioner never paid himself nor did he ever take a draw.

6. On January 22, 2001, the Division of Taxation ("Division") sent a letter to Universal Auto Leasing, Inc., d/b/a Majestic Motors which advised that an audit of its records would be performed at the business premises on February 9, 2001. Attached to the letter was a checklist of records which were necessary to perform the audit. Records requested included: a general ledger for the audit period²; cash receipts journal; cash disbursements journal; Federal income tax returns; sales tax returns and related worksheets; sales invoices; fixed assets invoices; bank statements, canceled checks and deposit slips; exemption documents; and general journal and closing entries. The letter asked that a copy of the letter be signed and returned to the auditor to confirm the audit date and location.

When the auditor received no response to his letter, he decided to make a field visit to the business with an investigator on March 13, 2001. At that time, the auditor met with petitioner who introduced himself as the president. No records were received by the auditor during the field visit. At the time of the field visit, the auditor observed approximately 25 cars on the lot. The auditor gave petitioner another copy of the appointment letter and checklist of records required for audit and told petitioner to give the letter to the accountant.

² The original audit period as set forth on the checklist was March 1, 1998 through November 30, 2000.

Since the audit was postponed on a few occasions, the auditor mailed a Consent Extending the Period of Limitation for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law to the corporation. On April 28, 2001, petitioner, as president, signed the consent on behalf of the corporation whereby it was agreed that sales and use taxes due from the corporation for the period March 1, 1998 through November 30, 1998 could be determined at any time on or before December 20, 2001.

7. Initially, the only records presented were the Federal income tax return for 1998, a form CT-4, General Business Corporation Franchise Tax Return Short Form, for 1998 and a form CT-3M/4M, General Business Corporation MTA Surcharge Return, for 1998, each of which had been signed by petitioner as president. In addition, the auditor was provided with bank statements for the period February 19, 1998 through August 17, 1999 from the Chase Manhattan Bank account and copies of canceled checks written on that account which bore what appeared to be the signature of petitioner.

8. Car dealers must complete a form MV-50, Retail Certificate of Sale, whenever a retail sale is made. Information required to be set forth by the dealer on the MV-50 includes the vehicle identification number, or VIN number, model, mileage and selling price. There are three copies of the MV-50, one of which goes with the registration, one is kept by the dealer and one is provided to the Department of Motor Vehicles ("DMV").

Each book of MV-50s contains 50 pages or 50 forms. After the 50 pages are used by the dealer, the book must be returned to DMV. While the current MV-50s contain the selling price of the vehicle, the forms used during the audit period did not contain the selling price.

During the audit period for the corporation, March 1, 1998 through August 31, 1999,³ 26 books of MV-50 forms were returned by Majestic Motors to the DMV. The auditor indicated that each book contained 50 pages, so for the period, approximately 1,300 (26 times 50) cars were sold.⁴

9. In order to determine the sales made by Majestic Motors for the audit period, the auditor used the MV-50s received from DMV and determined the selling prices by using Kelley Blue Book and the N.A.D.A. (National Automobile Dealers Association) Official Used Car Guide (the March, April and May 1999 N.A.D.A. guide was used by the auditor).

During the course of the audit, the auditor sent third-party verification letters to approximately 61 of Majestic Motors' customers; responses were received from approximately 15 to 20 customers. Therefore, due to the limited response, the results were not used in computing additional sales tax due. However, it must be noted that one of the customers who responded to the auditor's letter was Island Cable Construction, Inc., which indicated that it had purchased a vehicle from Majestic Motors on March 17, 1999. It further responded that the name of the salesperson was "John" and that the place of purchase was the Newburgh Auto Auction in Newburgh, New York.

10. For the period March 1, 1998 through August 31, 1999, Majestic Motors reported gross sales of \$343,045.00 and taxable sales of \$277,797.00. Utilizing the MV-50s obtained from the DMV and determining the selling price from the Kelley Blue Book and N.A.D.A. Official Used Car Guide, the auditor determined that for the period March 1, 1998 through

³ While the audit period for the corporation extended to November 2000, the business closed in August 1999.

⁴ The auditor testified that 15 books were returned by Majestic Motors during the audit period. A review of the record disclosed that from March 1998 through July 1999, 26 books were processed and subsequently returned to DMV.

August 31, 1999, Majestic Motors had taxable sales in the amount of \$9,028,836.10. Subtracting reported taxable sales resulted in additional taxable sales of \$8,751,039.10, with tax due thereon (at the rate of 8.25%) in the amount of \$721,960.73.

11. On August 10, 2001, the Division issued a Statement of Proposed Audit Change for Sales and Use Tax to Universal Auto Leasing, Inc., which determined additional sales and use taxes due from the corporation in the amount of \$721,960.73, plus penalty and interest, for a total amount due of \$1,276,021.71 for the period March 1, 1998 through November 30, 2000. While the Statement of Proposed Audit Change for Sales and Use Tax indicated that it was issued for the period March 1, 1998 through November 30, 2000, tax, penalty and interest were asserted to be due only for the period March 1, 1998 through August 31, 1999.

12. On August 15, 2001, Attorney Jeffrey M. Rosenblum, representing Universal Auto Leasing, Inc., sent a letter to the auditor in which he disagreed with the Statement of Proposed Audit Change for Sales and Use Tax which had been issued to the corporation. He stated in the letter that petitioner was the president and sole shareholder of Universal.

In the letter, Mr. Rosenblum asserted, among other things, that the volume of sales provided by the MV-50 books was impossible based upon the physical size of the premises and the corporation's limited resources. In addition, Mr. Rosenblum stated that petitioner had recently uncovered "an enormous scheme to defraud the State of New York and Universal."

Mr. Rosenblum's letter stated, in relevant part, as follows:

All financing deals were financed through banks such as Dime Auto Finance and BPD International Bank. The proceeds of these deals were paid directly into a bank account that Ettinger and Goldenberg controlled at BPD INTERNATIONAL BANK . . . This bank account was controlled by Ettinger and Goldenberg and registered to ILN LEASING, INC. d/b/a Majestic. Mr. Ettinger held this checkbook and signed all the checks for this account. Financing revenues were considerable.

Additionally, there was a Universal bank account opened in Illinois, sometime in early 1999. This account was held by and controlled by Goldenberg, who traveled to Chicago, Illinois to attend auctions every week. He would normally visit the Queens location on Tuesdays, collect cash and checks from Ettinger and then fly every Tuesday afternoon to Chicago. The account was in the First Suburban Bank of Illinois, in Chicago. Goldenberg had informed Pedrotti that it was necessary to have this account open since he did much of their vehicle purchasing in Illinois. Pedrotti never signed a check nor made a deposit to this account and bank statements were not mailed to Universal's office in Queens, NY.

POWERVIEW INC. was a NYS licensed wholesale dealer of used cars, whose principal was John Marino Marino, Ettinger and Goldenberg had been conducting this "fraud" arrangement for many years prior to the incorporation of Universal. The change of corporate entity was just a continuation of their business arrangement which was essentially a scheme to retain (and not remit) all sales tax monies received from high-end buyers recruited by Mr. Marino.

* * *

John Marino (Powerview) took clients to wholesale dealer auctions . . . to purchase high-end cars at least twice a week.

Upon purchasing a car for his client, Marino issued a bill of sale on Powerview letterhead. On this bill of sale, Marino collected monies for sales tax, as well as plates and registration. Additionally, since Marino had Majestic Motors to back him as a retail dealer, he would offer clients NYS issue plates to expedite the transaction; and these plates were provided by Ettinger. Marino turned over 50% of these monies for collected sales tax, plates and registration to Ettinger and Goldenberg and they, in turn, agreed to register the cars for Marino, running them through (in this case) Universal's books.

To help facilitate the scheme, Ettinger allowed Marino use of a "false" address 43-29 52nd Street, Woodside, New York 11572, which was a side entrance to the Universal lot on Queens Boulevard. Thus, Ettinger could handle all the Powerview business and as well [sic] as the paperwork. Ettinger controlled the MV-50 book for Powerview keeping this book in his desk and preparing wholesale assignments from Powerview to Majestic and then in turn retailing the vehicle to the client through Majestic's MV-50. When Pedrotti was instructed by Ettinger to prepare an MV-50, Ettinger told Pedrotti that since Powerview collected the sales tax at the auction from the client, Powerview would remit it, in full, to the State; accordingly, Universal was not liable for the sales tax collected and to be remitted by Marino.

13. On November 19, 2001, the Division issued a Notice of Determination to petitioner which assessed sales and use tax in the amount of \$456,492.32, plus penalty and interest, for a total amount due of \$805,977.57 for the period September 1, 1998 through August 31, 1999.⁵ The notice advised petitioner that he was being assessed as an officer or responsible person of Universal Auto Leasing, Inc.

14. As indicated in the Division's brief, the following documents provided the basis upon which it was determined that petitioner was an officer or responsible person of Universal Auto Leasing, Inc., d/b/a Majestic Motors:

- a. Sales tax returns (6) for the periods March 1, 1998 through August 31, 1999 which were signed by petitioner as president of the corporation;
- b. Third-party information from customers (*see*, Finding of Fact "9") who had purchased vehicles from "John" and/or "Majestic Motors";
- c. Application for Dealer Plate Issuance Program (DMV form MV-463) and certain order forms for registration number plates or in-transit permits;
- d. New York City Licensing Center, Department of Consumer Affairs, Basic Premises License Application signed by petitioner as president of Universal Auto Leasing, Inc. which indicates thereon that petitioner owns 100% of the corporate stock;
- e. A New York State Department of State filing receipt for an assumed name certificate which indicates that petitioner, as president, was the filer on behalf of the corporation;

⁵ The assessment period with respect to petitioner was shorter than the audit period due to the fact that the consent extending the period of limitation (*see*, Finding of Fact "6") applied only to the corporation and not to petitioner.

f. An Application for Registration as a Sales Tax Vendor for Universal Auto Leasing, Inc., d/b/a Majestic Motors listing petitioner as president (he was the only officer listed) and signed, as president, by petitioner;

g. A letter dated May 25, 2001 from Irwin Blanch, Accounting and Tax Services, to petitioner terminating Mr. Blanch's services which stated that "[d]ue to the information brought to my attention at your sales tax audit hearing I can no longer provide my services";

h. A New York State DMV Original Facility Application signed by petitioner as "Pres-Sec & Treas" and indicating that he owned 100% of the corporate stock; and

i. A copy of petitioner's driver's license which is attached to a New York City Department of Consumer Affairs License Application Checklist for a Second Hand Dealer Auto License.

15. For the period for which the corporation was assessed (March 1, 1998 through August 31, 1999), petitioner produced Chase Manhattan Bank statements which indicated that the total deposits into the account for this period were \$318,769.36. Petitioner signed the checks written on the Chase account although the checks were usually prepared by Arie Ettinger.

16. The signature card for a bank account at First Midwest Bank, N.A. (an Illinois bank) opened on January 20, 1999 for Universal Auto Leasing, Inc., d/b/a Majestic Motors, indicates that the signatories for the account were petitioner who was listed as the president and Haim Goldenberg who is listed as an officer. Signatures of each are set forth on the card. At the hearing, petitioner indicated that his signature on the card was forged and that he never signed anything with respect to this account. Bank statements from First Midwest Bank, N.A. were sent to the corporation in care of Haim Goldenberg.

Bank statements for this account indicate that for the period January 1999 (when the account was opened) through August 1999 (when the account was closed), total deposits into the account were in the amount of \$966,459.60.

Petitioner also produced photocopies of checks payable to Majestic Motors, deposit slips and checks written on Majestic Motors' account. Petitioner's signature does not appear on any of the checks or slips.

17. The signature card for a bank account at First Suburban National Bank (an Illinois bank) for Universal Auto Leasing, Inc., d/b/a Majestic Motors lists the signatories as petitioner who was referred to as the president/secretary and Haim Goldenberg, officer. The card does not indicate the date on which the account was opened. The signatures of petitioner and Mr. Goldenberg are set forth on the card. As was the case for the signature card for First Midwest Bank, N.A., petitioner indicated that his signature on the card was forged and that he never signed anything pertaining to this account.

The bank statements for this account indicate that the account was opened in January 1998 and was closed in June 1999. For this period, deposits into this account totaled \$2,671,244.43. Bank statements from First Suburban National Bank were sent to Universal Auto Leasing, Inc. d/b/a Majestic Motors at 17119 Equestrian Trail, Odessa, Florida 33556. According to the Summons with Notice in the lawsuit commenced by petitioner against Messrs. Ettinger and Goldenberg (*see*, Finding of Fact "19"), the address of Haim Goldenberg was 17119 Equestrian Trail, Odessa, Florida.

18. Irwin Blanch, the accountant for the corporation, prepared the sales tax returns and petitioner signed them as he was instructed to do so by Messrs. Ettinger and Goldenberg. The figures set forth on the return were supplied to the accountant by Arie Ettinger.

19. In June 2001, petitioner commenced a lawsuit in the Supreme Court of the State of New York, County of Nassau, on behalf of himself and the corporation against Leib Ettinger a/k/a Arie Ettinger and Haim Goldenberg. The lawsuit sought damages in the sum of \$1,000,000.00 based upon the defendants' breach of contract and fraud and concealment. In April 2005, the lawsuit was discontinued by petitioner due to a lack of financial resources.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Article 28 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. Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564).

The 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 the Tax Appeals Tribunal have identified a variety of factors as indicia of responsibility: the individual's knowledge of and control over the financial affairs of the corporation; authorization to write checks on behalf of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and the individual's economic interests in the corporation (*Matter of Martin v. Commr. of Tax & Fin.*, 162 AD2d 890, 558 NYS2d 239; *Matter of Cohen v. State*

Tax Commn., supra, 513 NYS2d 565; *Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862, 865; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990; *Matter of Baumvoll*, Tax Appeals Tribunal, November 22, 1989).

C. It is well settled that the holding of corporate office is not in itself a sufficient basis upon which to impose personal liability for sales tax found owing by a corporation (*Matter of Blodnick v. State Tax Commn., supra*; *Matter of Vogel v. New York State Dept. of Taxation & Fin., supra*). Likewise, the existence of one or more of the factors enumerated above does not definitively resolve the issue of personal liability for sales taxes. Rather, the various factors provide a framework for determining whether the individual had a duty to act for the corporation.

In the present matter, after a review of the record, it is clear that petitioner did not have the authority or control over the corporation to properly be considered a responsible officer or employee.

While it is true, as asserted by the Division, that petitioner was an officer and shareholder of the corporation, a bank signatory on corporate accounts and that he signed tax returns and various other documents on behalf of the corporation, these titles and duties were made a condition of his employment. Had he not agreed to the terms set down by Messrs. Ettinger and Goldenberg, he would have been out of a job. Petitioner was told that he would have to sign documents on behalf of the business because the principals could not. In reality, he was an employee who received a base salary of \$300.00 per week plus commissions. He contributed no

money to the startup of the business and while he was designated as a shareholder, he purchased no corporate stock. There is no indication in the record that he ever hired or fired employees.

As to the corporate bank accounts, petitioner, while a signatory on the accounts at Chase Manhattan Bank, First Midwest Bank, N.A. and First Suburban National Bank, signed checks and deposit slips drawn on the Chase Manhattan Bank account only. He never signed any checks or other documents pertaining to the other accounts. And while petitioner has been unable to prove that his signatures on the signature cards for the First Midwest Bank, N.A. and First Suburban National Bank accounts were forged as he alleges, a review of the business operations of Majestic Motors lends credence to this assertion by petitioner.

D. It is apparent from the credible testimony of petitioner that he was unaware of the activities of Arie Ettinger and Haim Goldenberg with respect to their dealings with John Marino and Powerview. As he testified, when he received notification of the audit, he contacted Mr. Ettinger and sent the notice to the accountant, Mr. Blanch. Neither Arie Ettinger nor Haim Goldenberg cooperated with the audit, refusing to turn over books and records of the corporation either to the auditor or to petitioner. Petitioner stated that when he and his attorney initially met with the auditor, “there was a stack of MV-50 books that was up to the ceiling. What that meant to me was just a ton of cars that we weren’t aware of.”

The auditor testified that at the time of his field visit, there were approximately 25 cars on the lot. The fact that the Division’s investigation revealed that approximately 1,300 cars were sold during the audit period led petitioner to logically conclude that many of the cars were sold off premises.

Petitioner initiated a lawsuit against Messrs. Ettinger and Goldenberg in June 2001 and from discovery conducted in connection with this lawsuit, he learned of the existence of the

other bank accounts. In addition, he was able to determine that more than \$3.6 million dollars had been deposited into the Illinois (First Midwest Bank, N.A. and First Suburban National Bank) accounts. In contrast, only \$318,769.36 had been deposited into the local (New York) account at Chase Manhattan Bank during the period for which the corporation was assessed, i.e, March 1, 1998 through August 31, 1999.

E. Clearly, petitioner was duped by Arie Ettinger and Haim Goldenberg when he accepted employment with Majestic Motors at the new location at 52-01 Queens Boulevard, Woodside, New York. As noted above, while he signed corporate documents, tax returns and some checks (those written on the Chase Manhattan Bank account) as an officer of the corporation, this was a condition of his employment. He was nothing more than an employee who held titles that he was directed by Arie Ettinger and Haim Goldenberg to hold. The existence of the Illinois bank accounts and the scheme to pocket sales tax through Majestic Motors' dealings with John Marino and Powerview when taken together with the designation of petitioner as the sole corporate officer are clear evidence of the elaborate tactics employed by Messrs. Ettinger and Goldenberg to defraud the State while, at the same time, insulating themselves from personal liability. To hold petitioner as a responsible officer of Universal Auto Leasing, Inc., thereby imposing personal liability for the sales taxes pocketed by his employers would be a travesty of justice under the circumstances herein.

F. By virtue of the holdings in Conclusions of Law "C" through "E", Issue II is moot.

G. The petition of John Pedrotti is granted and the Notice of Determination issued to him on November 19, 2001 is hereby canceled.

DATED: Troy, New York
August 2, 2007

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE