

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOSEPH SAVINO, JR. : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NOS. 821052 AND
and Use Taxes under Articles 28 and 29 of the Tax Law : 821086
for the Periods September 1, 2001 through August 31, :
2002 and December 1, 2000 through August 31, 2003. :

Petitioner, Joseph Savino, Jr., filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 2001 through August 31, 2002 and December 1, 2000 through August 31, 2003.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 21, 2006, at 10:30 A.M., with all briefs to be submitted by August 27, 2007, which date began the six-month period for the issuance of this determination. Petitioner appeared by DeGraff, Foy, Holt-Harris & Kunz, LLP (James H. Tully, Jr., Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether petitioner was personally liable for the sales and use taxes due on behalf of Finne Bros. Refuse Systems, 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.

III. Whether the stipulation as to New York State sales and use tax liability executed between Finne Bros. Refuse Systems, Inc., and the United States Bankruptcy Court fixes the derivative liability of petitioner as a responsible person under the Tax Law.

IV. Whether the notices issued in this matter represent a duplication of sales and use taxes for the same periods.

FINDINGS OF FACT

1. Finne Bros. Refuse Systems, Inc. (Finne) operated a refuse collection business in New York State from March 1, 1999 through August 31, 2003.

2. On or about January 18, 2002, the Division of Taxation (Division) requested the books and records of Finne for the initial audit period, March 1, 1999 through November 30, 2001, by a letter informing the company that its sales and use tax records for that period were scheduled for audit and that all books and records pertaining to its sales and use tax liability were requested for examination. Additional requests for records were made by the Division in correspondence dated March 6, 2002, July 19, 2002, November 5, 2002 and April 14, 2003. In a letter, dated October 17, 2003, the audit period was extended to include the period December 1, 2001 through August 31, 2003, and a request for books and records for that period was made.

3. The company provided limited sales invoices for a few months in 2000 and a portion of its accounts receivable. No general ledger or purchase invoices were provided, and the vast majority of the records requested were not made available. The Division determined the records produced were inadequate to conduct an audit and determine the sales tax liability of the company. Thereafter, the Division learned that the corporation was going into bankruptcy. The Division chose to estimate the corporation's liability by using its own reported sales on its filed sales tax returns, disallowing 95% of reported nontaxable sales, since none of the nontaxable

sales were substantiated. This became the sole basis for the amount of tax due for the audit period as to the corporation, and ultimately provided the basis for the two notices of determination dated March 15, 2004, issued to petitioner (*see* Finding of Fact “6”), during the time he was allegedly involved in the business.

4. For the first nine months of the audit period, from March 1, 1999 through November 30, 1999, no additional tax was assessed. It was noted that no tax was computed for these quarters since the corporation claimed 100% of its sales as taxable during those quarters.

5. The following notices were issued to Finne on February 20, 2004:

Notice Number	Period	Tax Amount
L-023537513-6	12/1/99-2/28/03	\$413,503.00
L-23537514-5	3/1/03-8/31/03	\$135,296.00

6. The following assessments were issued to petitioner:

Notice Number	Notice Date	Period	Tax Amount
L-023544990-1	3/15/04	12/1/00-2/28/03	\$376,474.00
L-023544991-9	3/15/04	3/1/03-8/31/03	\$135,296.00
L-021723070-9	11/07/02	9/1/01-11/30/01	\$69,456.00
L-021723069-9	11/07/02	12/1/01-2/28/02	\$69,456.00
L-022031772-8	2/18/03	3/01/02-5/31/02	\$34,655.00
L-022031771-9	2/18/03	6/1/02-8/31/02	\$36,215.00

Two notices of estimated determination were issued to the corporation for failure to file timely returns. Accordingly, the two notices dated November 7, 2002 were issued to petitioner as a responsible person for the taxable sales at the time of nonfiling.

One Notice of Determination was issued to the corporation for a partial remit return. Accordingly, one notice dated February 18, 2003 was issued to petitioner as a responsible person

for the taxable sales upon which no remittance was made. Total reported tax due was \$34,655.00, with a partial remittance of \$6,656.00.

One Notice of Determination was issued to the corporation for a no-remit return. Accordingly, the second notice dated February 18, 2003 was issued to petitioner as a responsible person for the taxable sales upon which no remittance was made.

7. As previously mentioned, during the audit, the Division was notified that the corporation was filing for bankruptcy. The Involuntary Bankruptcy Petition filed by Finne, dated March 24, 2003, stated that Gerald DiDomenico was the president of Finne and 100% shareholder. Sometime thereafter, Finne entered into a plan of reorganization in the United States Bankruptcy Court, Southern District of New York. Since limited funds were available, the Division fixed the amount of tax due from Finne at \$466,547.97, consisting of a priority unsecured tax liability in the amount of \$346,547.97, and a general unsecured claim of \$120,000.00. Petitioner and Gerald DiDomenico were listed as general unsecured claims in Article XI of the Second Amended Plan of Reorganization of Finne Bros. Refuse Systems, Inc., submitted into evidence.

8. Westchester Solid Waste Commission applications, dated March 14, 2000, April 1, 2004 and March 16, 2005, list Gerald DiDomenico as the principal of the applicant, Finne. The application dated April 6, 2001 lists Debra J. DiDomenico in that capacity and lists petitioner as sales manager. This is the only mention of petitioner in any of these documents.

9. Two corporate income tax returns, or pages therefrom, were introduced into evidence by the Division, one for the tax year July 1, 2000 through June 30, 2001 and the second for the tax year July 1, 2001 through June 30, 2002. The former listed petitioner as a 50% shareholder, with 100% of his time devoted to the business and receiving \$72,000.00 in compensation. The

latter listed petitioner as a 50% shareholder devoting 100% of his time to the business and receiving no compensation. Both of these returns were prepared by the CPA firm of Portney & Company. These documents formed the basis for the determination of the Division's auditor to deem petitioner a "responsible person" of Finne for the periods in issue.

10. Petitioner introduced into evidence the corporate income tax returns for the tax year July 1, 2002 through June 30, 2003, and the return for tax year July 1, 2003 through June 30, 2004. On both of these returns Gerald DiDomenico was listed as a 100% owner of the voting stock of Finne. Petitioner was not listed as a shareholder. These returns were prepared by Kevin M. Boiselle, CPA, of Boiselle, Morton & Associates, LLP.

11. New York State sales and use tax returns covering the periods running from December 1, 1999 through November 30, 2000 bore the signature of Gerald DiDomenico. None were signed by petitioner.

12. Correspondence dated November 7, 2003 from S. Buxbaum and Company, CPA's, to the Division's auditor, disagreeing with the audit findings was sent in duplicate to "Joe Savino and Gerald DiDomenico."

13. The Division introduced into evidence a copy of a Closing Statement entitled "Purchase and Sale of the stock of Finne Brothers Refuse Systems, Inc.; the Covenant Not to Compete of John Finne and Robert W. Finne; and the Real Property owned by Robert W. Finne & Co., Inc., dated January 7, 2000. In a portion of the Closing Statement entitled "Description of the Transaction" a reference is made to an "Amended and Restated Contract of Sale and Non Compete Agreement dated January 7, 2000" for the purchase of the issued and outstanding stock of Finne by Gerald DiDomenico and Joseph Savino. The Closing Statement represented that the transaction was originally anticipated to be an asset acquisition pursuant to the 1998 contract of

sale of the land, building, equipment, goodwill and noncompete agreement. However, the agreement was thereafter amended to represent a purchase of the stock of Finne, the noncompete agreement and the real property located at 225 Railroad Avenue, Bedford Hills, New York. The purchase price of \$1,150,000.00 was allocated as follows: \$350,000.00 allocated to the stock; \$250,000.00 was allocated to the noncompete agreement; and \$550,000.00 was allocated to the land and building. Also pursuant to the Closing Statement, Finne was directed to deliver the deed transferring the property to DD&S, a company owned by petitioner. The amended contract dated January 7, 2000 was not made a part of the record.

14. A Power of Attorney was introduced into evidence by the Division, which authorized Stewart Buxbaum, CPA, to represent Finne in all matters before the New York State Department of Taxation and Finance. Petitioner's name is printed below a scribbled signature, next to the title of vice president. The document was undated, and there is no indication when it was prepared. It bore only facsimile date designations during 2001 and a date stamp as having been received by the Division of Tax Appeals on October 22, 2001.

15. Petitioner, the former owner of another waste management company, is the brother-in-law of Gerald DiDomenico. Knowing petitioner's experience in the waste management industry, Mr. DiDomenico asked petitioner for financial assistance in Mr. DiDomenico's investment in Finne, and relied on him for some sales advice based on his business experience. Petitioner had no desire to become a partner in any capacity in business with a family member, but agreed to loan Mr. DiDomenico in excess of \$500,000.00 to assist him in the financing of the company. No written documents securing the loan or setting forth the terms of their agreement were prepared. Petitioner had helped Mr. DiDomenico many times in the past and accepted his word that petitioner would be repaid.

Petitioner's role in Finne was as a salesman and sometimes as a truck driver. He did not sign checks, hire or fire employees, and did not handle any of the daily finances for Finne. Petitioner was never a shareholder of Finne, and his primary function was to recommend customers to pursue.

16. At some point in time a company owned by petitioner, DD&S, acquired an interest in the real estate upon which Finne's facility was located.

17. After the hearing, petitioner was given an opportunity to submit additional documentation in an effort to clarify questions raised at the hearing, particularly with respect to the closing statement submitted into evidence that allegedly represented the purchase of Finne by petitioner and Gerald DiDomenico. The following documentation was submitted:

a. An affidavit by Howard W. Muchnick, Esq., which stated that the closing statement entered into evidence during the hearing was never signed and did not represent the contractual purchase of Finne Brothers Refuse Systems, Inc. He does not believe petitioner was ever a shareholder with Finne.

b. A copy of the actual contract for the purchase of Finne solely by Gerald D. DiDomenico, dated June 12, 1998, signed by the Finne owners and Gerald DiDomenico alone.

c. A copy of the stock sale and purchase agreement representing the sale of the stock of Finne in May 2005, signed by Gerald DiDomenico, who was the owner of all the outstanding shares of Finne, to Rogan Brothers Sanitation, Inc. Petitioner is mentioned in this contract in his individual capacity and agreed to become a party to the agreement with respect to a particular section of the agreement whereby he agreed to a noncompetition agreement as a condition of the contract of sale by Mr. DiDomenico. Petitioner's signature appears on the final page of the contract as acknowledging and agreeing "with respect to Section 7 [of the contract] only."

d. A copy of the First Amendment to the Stock Sale and Purchase Agreement, dated July 7, 2005, which is signed only by Gerald DiDomenico and transfers to Rogan Brothers 100% of all the issued and outstanding shares of Finne.

e. A copy of the Application for Permission to Proceed with Asset or Business Sale Transaction, presented to the Westchester County Solid Waste Commission on or about November 29, 2001, with signed certifications by Gerald DiDomenico and Debra DiDomenico. There is no mention of petitioner in these documents.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner maintains that he is not a responsible officer of Finne. He assisted his brother-in-law as he had many times in the past, but did not enter into a partnership with him, or acquire any form of ownership in Finne. Petitioner argues that if he is determined to be a responsible officer, his liability should be capped in accordance with the agreement reached with the Bankruptcy Court and Finne as his derivative liability.

19. The Division maintains that petitioner is a responsible person under the Tax Law. Further the Division stands by its estimated method of determining the taxes due, and the assessments issued to petitioner. The Division asserts that the agreement between Finne and the Bankruptcy Court is between them alone, and is not controlling as to the amount that the Division may seek from petitioner.

CONCLUSIONS OF LAW

A. The primary issue in the matter is the personal liability status of petitioner. 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 includes “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]).

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, 1023, 513 NYS2d 564, 565 [1987]). The ultimate question to be resolved in any responsible officer 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).

B. Specific factors to consider when determining responsible officer status under Article 28 are the authorization to hire and fire employees (*Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536 [1986], *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027 [1987]); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation (*Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]; *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 (*Matter of 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 (*Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239 [1990]); 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 (*Matter of Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427 [1978]). Another factor is the individual's simultaneous status as an officer, director and shareholder (*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 (*Matter of Vogel v. New York State Dept. of Taxation & Fin., supra; Matter of Blodnick v. New York State Tax Commn., supra*).

A proper analysis of responsible person status is not simply a matching of the traditional indicia of responsibility to a person's surface acts. A consideration of the circumstances is required:

Thus the pertinent inquiry in a responsible officer case is not whether a person was an officer or performed the duties traditionally associated with such a position, but rather, whether the person in fact had authority to control the performance of the duties he performed (*see, Matter of Hall*, [Tax Appeals Tribunal, March 22, 1990]; *Matter of Constantino, supra*). In other words, our analysis takes into account whether the person's acts were ministerial rather than evidence of actual authority (*Matter of Taylor*, Tax Appeals Tribunal, October 24, 1991).

C. 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. (*Matter of Blodnick v. State Tax Commn., supra; Matter of Vogel v. New York State Dept. of Taxation & Fin., supra*). 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 person responsible for collection of sales tax.

D. While it is true, as asserted by the Division, that petitioner invested a significant sum of money in his brother-in-law's business, this fact alone is insufficient to elevate him to be a

responsible person under the Tax Law. He had assisted his brother-in-law at various times in the past, had no reason to believe he would not be repaid, and did not require documents be drafted to evidence his loan to DiDomenico.

It does not appear that petitioner was ever a shareholder of the corporation, but rather that he acquired the ownership of the land and building on which Finne operated in return for the funds invested with DiDomenico. Even if he had become a shareholder for some period of time, that fact alone, absent additional elements, would not subject him to the personal liability asserted herein (Tax Law § 1131[1]). Further, petitioner was never an officer of the corporation, there was no evidence of bank signatory rights on corporate accounts and none of the corporate or sales tax returns submitted into evidence were signed by him. Petitioner was an employee who received a salary for his work as a salesman during the latter part of 2000 and early 2001, and not thereafter. He was tapped for his prior business experience in the waste business, particularly in his sales capacity, and at other times while at Finne, he drove a truck. There is no indication in the record that he ever hired or fired employees. Although the Division's documents bore a power of attorney allegedly signed by petitioner on behalf of the company, petitioner did not recall signing the power and could not identify with certainty that the signature was his. It listed him as signing in the capacity of vice president, an office he never held with Finne, and it was undated. Thus, there is little weight assigned to this document.

E. Petitioner provided credible testimony at the hearing about his relationship with his brother- in-law, his role at Finne and his limited involvement. He indicated that the corporate returns listing him as a shareholder did so in error, as he never owned stock of Finne. Post-hearing clarification of the purchase of Finne by Mr. DiDomenico alone, and the ultimate sale of the company, was submitted into evidence, including the actual contracts that were executed, for

both the purchase and the sale, and an affidavit from Howard Muchnick, Esq., an attorney who had been used by petitioner for representation. Likewise the bankruptcy documents and all of the documents obtained from the Westchester County Waste Commission are consistent with petitioner's position that his involvement in Finne was limited to his salesman status, and that Gerald DiDomenico was at all times the 100% shareholder of Finne. Petitioner did not have authority or control over the affairs of the corporation. The foregoing factors strongly support a conclusion that petitioner was not a person responsible for collecting and remitting sales tax under Tax Law § 1133(a) and therefore not personally liable for the tax at issue Tax Law § 1131(1).

F. By virtue of the holding in Conclusion of Law "E," Issues II, III and IV are moot.

G. The petition of Joseph Savino, Jr. is granted and the notices of determination issued to him dated March 15, 2004 and February 18, 2003, and the notices of estimated determination dated November 7, 2002 are hereby canceled.

DATED: Troy, New York
February 21, 2008

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE