

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARK LEVINSON : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NO. 821486
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period September 1, 2001 through May 31, 2002. :

Petitioner, Mark Levinson, 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 period September 1, 2001 through May 31, 2002.

A hearing was commenced before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 23, 2007 at 11:30 A.M., and continued to conclusion at the same location on January 24, 2008, with all briefs to be submitted by June 12, 2008, which date began the six-month period for the issuance of this determination. Petitioner appeared by Warner & Scheuerman (Jonathan D. Warner, Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael Infantino, Esq., of counsel).

ISSUE

Whether petitioner was personally liable for sales tax due on behalf of Red Rose Music, Inc., as a person required to collect and pay tax under Tax Law §§ 1131 and 1133.

FINDINGS OF FACT

1. On May 19, 2003, the Division of Taxation (Division) issued three notices of determination as follows:

Period Ended	Tax	Interest	Penalty	Total Due
11-30-01	\$69,843.41	\$13,609.51	\$18,614.21	\$102,067.13
02-28-02	\$44,455.99	\$ 7,476.94	\$10,851.92	\$ 62,784.85
05-31-02	\$ 0.00	\$ 347.10	\$ 2,898.81	\$ 3,245.91

Each of the notices indicated that petitioner, Mark Levinson, was being held liable as an officer or responsible person of Red Rose Music, Inc.

2. For each of the sales tax quarters ended November 30, 2001 and February 28, 2002, the corporation filed a sales tax return without remitting the tax on April 9, 2002 and June 18, 2002, respectively. For the quarter ended May 31, 2002, the corporation, which was required to make monthly sales and use tax prepayments in each quarter on Form ST-809, made late payments of \$13,663.27 and \$13,958.64 for March 2002 and April 2002, respectively, on June 10, 2002. The corporation timely filed the sales tax return for the quarter ended May 31, 2002 and paid \$15,576.37, the amount of tax due for the month of May 2002, on June 20, 2002.

3. Prior to and during the period at issue, Red Rose Music, Inc., (Red Rose Music) manufactured audio systems, which it marketed and sold to wholesale and retail customers. Red Rose Music was incorporated in New York State by petitioner on December 16, 1998. Petitioner has been the chief executive officer and president of Red Rose Music throughout its existence including the period September 1, 2001 through May 31, 2002.

4. From its incorporation and at all relevant times, petitioner owned 66 percent of Red Rose Music's common stock. The record does not include the identity and ownership percentage

of the remaining shareholders. Petitioner did not submit the articles of incorporation, bylaws or minutes of any meeting of the corporation into the record.

5. Red Rose Music did not immediately begin doing business after it was formed by Mr. Levinson. Because the corporation planned on manufacturing, marketing and selling its products, petitioner spent time raising money, developing products, lining up suppliers and creating a marketing plan for its products.

6. Petitioner, a high school graduate, has had a long career in the music field. He has been a professional jazz musician and a recording engineer. Since 1970, petitioner has designed, marketed and sold music systems. In his career, petitioner has designed the various components of a music system including preamplifiers, power amplifiers, and loudspeaker systems. Red Rose Music was the third corporation formed by petitioner to market and sell the music systems that he designed. Petitioner devoted 100 percent of his time to the development, marketing and sales of Red Rose Music's audio systems.

7. Prior to and during the period at issue, Red Rose Music leased space at two locations in New York City, a business office located at 17 East 171st Street, and a small retail store located at 643 Madison Avenue. Petitioner worked at the retail store, the back door of which opened into the Whitney Museum. At some point after the period in issue, Red Rose Music closed the Madison Avenue and 17 East 171st Street locations, and leased space at 191 7th Avenue, New York, New York.

8. Petitioner hired the individual who served as the chief financial officer and chief operating officer (CFO and COO) and who was responsible for the day-to-day management of the corporation's financial matters, which included, among other things, receivables, the payment

of bills and the filing of tax returns and reports with governmental agencies. The CFO and COO worked at the corporation's business office. When necessary, petitioner fired the CFO and COO.

9. Petitioner had the authority to sign a power of attorney on behalf of Red Rose Music. He was also an authorized signatory on Red Rose Music's business checking account and was the named contact on the corporation's checking account business signature cards. He authorized others to write checks on the corporation's checking account. In addition, petitioner signed check cashing authorization signature cards appointing Rosaria Ricafort and Steven Hluchan to cash checks drawn on the corporation's business checking account.

10. Petitioner signed a license agreement and a Uniform Commercial Code financing statement on behalf of Red Rose Music. He also signed corporate tax returns on behalf of Red Rose Music. In addition, petitioner had the authority to negotiate with the Internal Revenue Service (IRS) and the New York State Department of Taxation and Finance with regard to the tax liabilities of Red Rose Music.

11. In December 2000, petitioner hired Steven Teachout as Red Rose Music's CFO and COO. Mr. Teachout replaced Steven Hluchan who departed for health reasons. Mr. Teachout managed the corporation's financial matters until August 2002. The record does not include a copy of Mr. Teachout's employment contract.

12. On May 10, 2002, Morris D. Schiller, a tax compliance agent in the Division's Metropolitan District Office Tax Compliance Division, made a field visit to Red Rose Music's retail store. During that visit, Mr. Schiller informed petitioner, who admitted owning the corporation, that Red Rose Music had outstanding sales tax liabilities.

13. On May 20, 2002, Mr. Teachout sent a letter to Mr. Schiller admitting that Red Rose Music had delinquent sales tax liabilities of \$199,554.00 for the period March 1, 1999 through

February 28, 2002 and an unpaid sales tax liability totaling \$27,621.00 for the months of March and April 2002, two months of the then current sales tax quarter. In this letter, Mr. Teachout proposed an informal payment agreement to the Division. Petitioner and Alan Dlugash were copied on this letter.

14. By power of attorney dated May 30, 2002, petitioner appointed Mr. Teachout and Alan Dlugash, CPA, to represent Red Rose Music before the Division in connection with sales tax liabilities for the years 2000, 2001 and 2002. Thereafter, Messrs. Teachout and Dlugash began submitting documentation in support of Red Rose Music's request for an installment payment plan (IPA). Petitioner was copied on all letters transmitting documentation to the Division.

15. On August 5, 2002, petitioner, as president of Red Rose Music, executed a Statement of Financial Condition and Other Information (statement of financial condition), Form DTF-5, which was filed with the Division on August 8, 2002. In that statement of financial condition, petitioner's salary, as president and sole officer of Red Rose, was listed as \$100,826.00 and \$180,769.00 for the years 2000 and 2001, respectively.

16. On August 15, 2002, petitioner signed a Proposed Terms for Installment Payment Agreement (proposed terms for IPA) for Red Rose Music and an Authorization Agreement for Automatic Payment Deductions by the State from Red Rose Music's checking account, as "President & CEO." These documents, along with a void corporate blank check, were submitted to the Division's Tax Compliance Division in support of Red Rose Music's proposed installment payment agreement.

17. On August 5, 2002, petitioner, as president of Red Rose Music, signed the corporation's 1999 federal income tax return (Form 1120), the corporation's 1999 Form CT-3M/4M, General Business Corporation MTA Surcharge Return, the corporation's 2000 federal

income tax return (Form 1120), the corporation's 2000 Form CT-3, General Business Corporation Franchise Tax Return, and the corporation's 2000 Form CT- 3M/4M, General Business Corporation MTA Surcharge Return. The corporation's 1999 Form 1120 indicates that petitioner is the only officer; that he devotes 100 percent of his time to the business; and that he owns 66 percent of the common stock. The corporation's 2000 Form 1120 reveals the same information, in addition to a \$100,000.00 salary for petitioner.

18. As noted above, Mr. Teachout was Red Rose Music's CFO and COO until his employment was terminated by petitioner in or about August 2002. James Garfinkel assumed the responsibilities as Red Rose Music's CFO and COO at that time. Mr. Garfinkel's responsibilities included, among other things, managing the corporation's relationship with the Division and the IRS and keeping petitioner informed of all important developments in the corporation's finances and sales. Mr. Garfinkel was hired by petitioner in or about July 2002. The record does not include Mr. Garfinkel's employment contract.

19. In January 2003, the collection of Red Rose Music's outstanding sales tax liabilities was reassigned to Tax Compliance Agent Bernard Rezmovits for further action.

20. After reviewing documentation in the tax compliance file, Mr. Rezmovits determined that petitioner was a person responsible for collecting and paying over the sales taxes of Red Rose Music. In making his determination, Mr. Rezmovits used the following documents: the power of attorney signed by petitioner appointing Messrs. Teachout and Dlugash as representatives of the corporation; the proposed terms for IPA signed by petitioner; the Authorization Agreement for Automatic Payment Deductions signed by petitioner, as president and chief executive officer of Red Rose Music; the corporation's DTF-5, statement of financial condition, signed by petitioner as president; and the Form 1120, signed by petitioner as president,

which indicated that petitioner was the officer of the corporation, that he was compensated by the corporation and that he owned 66 percent of the stock of the corporation. As noted in Finding of Fact 1, the Division issued three notices of determination to petitioner as an officer or responsible person of Red Rose Music.

21. After Mr. Garfinkel became Red Rose Music's CFO and COO, the corporation made a number of payments to reduce its outstanding sales tax liability. However, a number of checks bounced, and the payments ceased. In addition, Red Rose Music did not remain current on its tax filings.

22. Mr. Garfinkel informed petitioner that an installment payment arrangement was negotiated and that he would make sure that the required installment payments were made. A formal installment payment agreement was never entered into between Red Rose Music and the Division.

23. Sometime in October 2003, the Division levied the corporation's bank account and proceeded with further collection action. The Division also levied petitioner's personal bank account sometime in October 2003.

24. On or about October 27, 2003, petitioner fired Mr. Garfinkel.

25. In an effort to convince it to stop the collection process against the corporation for awhile, the corporation submitted to the Division a copy of a license agreement by and among Red Rose Music, Premier Resources International, LLC, and Mark Levinson, individually. This licensing agreement, dated October 13, 2003, was signed by petitioner as chief executive officer of Red Rose Music, and also in his individual capacity. The corporation's representative copied petitioner on the letter transmitting the license agreement to Mr. Rezmovits.

26. After October 2003, Red Rose Music continued to make audio system sales. It is unclear when Red Rose ceased making sales.

27. The Division continued to pursue collection of the outstanding tax liabilities from the corporation. In connection with its collection process, the Division received two powers of attorney for Red Rose Music. The first, dated April 26, 2004, signed by Mark Levinson, as president, appointed David Gentile, CPA, and Wayne Lin, CPA, of the accounting firm Gentile, Pismary & Bangel, to represent the corporation concerning sales tax for 2001 and 2002. The second, dated November 7, 2005, bearing an illegible signature, appointed Barbara Jean Garrett and Travis Loss of Quantum Financial Solutions, LLC, Boulder, Colorado, as representatives for Red Rose Music concerning sales tax for 2001 through 2005 and withholding tax for 2001 through 2005.

28. At the hearing, petitioner identified seven investors from whom the corporation received unspecified amounts of money. The record does not include any documentation concerning the amount or type of investment, i.e., equity interest or loan, made by each of these investors, or any requirements and restrictions placed on such investments by these investors. A board of directors was never formed.

29. At the hearing, petitioner claimed that someone forged his signature on the proposed terms for IPA. No documentation was submitted to support this claim.

30. At the hearing, petitioner admitted that he was never involved in the financial management of Red Rose Music because he focused his energy on getting the business off the ground through product development, marketing, sales, speaking with customers and helping with custom audio system installations.

31. On or before July 7, 2007, petitioner paid the outstanding sales tax liabilities due on the three notices of determination issued for the period September 1, 2001 through May 31, 2002.

SUMMARY OF PETITIONER'S POSITION

32. Petitioner does not dispute that he was president and chief executive officer of Red Rose Music during all relevant times in this proceeding. However, petitioner contends that he never possessed the duty to pay the corporation's sales taxes, and therefore was not a person responsible for such payment pursuant to the Tax Law. Rather, he maintains that his duties were restricted to product design, marketing and sales, which he carried out at the company's retail store. Petitioner asserts that he was denied the responsibility of overseeing the corporation's finances at the express request of Red Rose Music's investors, who knew petitioner lacked the training and experience required to manage the corporation's finances. Petitioner maintains that the CFO and COO had exclusive responsibility for the management of the company's finances and the payment of its taxes, and that all the corporation's books and records were maintained by the CFO and COO at the company's business office. He contends that Mr. Teachout, Red Rose Music's CFO and COO from December 2000 through August 2002, was entirely "autonomous." Petitioner further contends that Mr. Teachout decided which corporate obligations were paid. He avers that Mr. Teachout, who did not report to him, never discussed finances with him or sent him financial reports. With respect to Mr. Garfinkel, Red Rose Music's CFO and COO from August 2002 through October 27, 2003, petitioner claims that Mr. Garfinkel was exclusively responsible for the management of Red Rose Music's finances and business records, and was also granted complete "autonomy" as CFO and COO. Petitioner further claims that Mr. Garfinkel, as CFO and COO, decided which corporate obligations were paid. He asserts that Mr.

Garfinkel never informed him that the corporation was not making installment tax payments to the Division. Petitioner requests that the notices of determination be cancelled and the monies paid by him on such assessments be refunded to him.

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 [1979]; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427 [1978]; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed* 214 AD2d 857, 625 NYS2d 343 [1995], *lv denied* 86 NY2d 705, 632 NYS2d 498 [1995]). 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 [1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862 [1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239 [1990]; *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*).

C. 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*; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). In order to prevail, "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 he was thwarted by others in carrying out his corporate duties through no fault of his own (citations omitted)" (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998).

D. The facts in this case indicate that petitioner was a responsible officer of the corporation. He formed Red Rose Music and owned 66 percent of its stock. He was the president and chief executive officer of Red Rose Music since its founding. He devoted all of his working time to Red Rose Music and received a substantial salary for such work. He hired and

fired employees. He signed a Uniform Commercial Code financing statement and a licensing agreement on behalf of Red Rose Music. Petitioner had authority to sign corporate tax returns and did sign Red Rose Music's federal income tax returns and State franchise tax returns. He had authority over the corporation's checking account and granted check signing and check cashing authority to corporate employees. He signed a power of attorney appointing Messrs. Teachout and Dlugash as the corporation's representatives concerning its outstanding sales tax obligations for 2000, 2001 and 2002. He also signed, on behalf of Red Rose Music, the statement of financial condition (DTF-5), the proposed terms for IPA and the Authorization Agreement for Automatic Payment Deductions, which were submitted to the Division's Tax Compliance Division in support of the corporation's proposed installment agreement for its outstanding tax liabilities. The foregoing facts indicate that petitioner had broad authority with respect to the management of the corporation and thus indicate responsible officer status.

E. Petitioner contends that he is not a responsible officer because he never possessed the duty to pay Red Rose Music's sales taxes. Petitioner claims that the division of labor and responsibility in this case was evidenced by the fact that the corporate books and records were maintained in Red Rose Music's business office where its CFO and COO worked while he worked exclusively at the separate retail store.

Petitioner's arguments are without merit. There is no evidence in the record to show that petitioner's authority as president and chief executive officer was restricted in any way. The record does not include the articles of incorporation, corporate bylaws, minutes of corporate meetings or any documentation concerning investments made by others into the corporation. Petitioner was the sole corporate officer and major shareholder of the corporation and, as such, had a fiduciary duty to the corporation in complying with the corporation's tax obligations (*see*

Matter of Martin v. Commissioner of Taxation & Fin. at 890, 55 NYS2d at 240; *Matter of Goodfriend*; *Matter of Ross*, Tax Appeals Tribunal, August 1, 1996). The record indicates that petitioner chose to focus all of his energy on development, marketing and sales of Red Rose Music's products, and to delegate the responsibility for the management of the corporation's financial matters to the CFO and COO. Steven Teachout, Red Rose Music's CFO and COO from December 2000 until August 2002, and James Garfinkel, Red Rose Music's CFO and COO from August 2002 until October 27, 2003, were hired and fired by petitioner. The record contains no evidence of any restrictions on petitioner's ability or authority to inspect the corporate books and records at any time. Rather, he simply never asked to do so. The record reveals no physical or legal impediment to inquiring or acting, nor of being deliberately misled, lied to or thwarted in the face of inquiries or other efforts to assure compliance with Red Rose Music's tax obligations. Mr. Levinson delegated responsibility for management of Red Rose Music's financial matters to Steven Teachout and then to James Garfinkel, and he exercised no oversight over how the financial aspects of the business were carried out. Such a delegation does not excuse petitioner from responsibility (*Matter of La Penna*, Tax Appeals Tribunal, March 14, 1991). The fact that petitioner, as president, failed to exercise his responsibility does not absolve him from liability. A corporate officer is not at liberty to disregard his duty and leave it to someone else to complete (*Matter of Blodnick v. State Tax Comm.* at 437, 507 NYS2d at 538 [1986]; *Matter of Martin*; accord *Matter of Capoccia v. State Tax Commn.*, 105 AD2d 528, 529, 481 NYS2d 476, 477 [1984]).

F. Petitioner contends that both CFO and COO Teachout and CFO and COO Garfinkel should be held responsible for the sales tax due from the corporation, since they were responsible for all of the corporation's financial matters including which corporate obligations were paid. It

is not a defense, however, to petitioner's position that other parties may also be liable for taxes due from the corporation.

Tax Law § 1133(a) provides that “*every* person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article” (emphasis added), thereby creating joint and several liability for unpaid sales tax (*Matter of Phillips*, Tax Appeals Tribunal, May 11, 1995). The Division is under no obligation to pursue other responsible persons before proceeding against petitioner (*Matter of Risoli v. Commissioner of Taxation and Finance*, 237 AD2d 675, 654 NYS2d 218 [1997]).

Accordingly, petitioner is a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133 and is personally liable for the sales taxes due on behalf of Red Rose Music for the period September 1, 2001 through May 31, 2002.

G. The petition of Mark Levinson is denied and the notices of determination issued to petitioner on May 19, 2003 are sustained.

DATED: Troy, New York
December 11, 2008

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE