

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOSEPH P. SANTO** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 821797  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period March 1, 2005 through November 30, :  
2005. :  
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Petitioner, Joseph P. Santo, 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 March 1, 2005 through November 30, 2005.

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 June 12, 2008 at 10:30 A.M., with all briefs to be submitted by September 15, 2008, 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. (Osborne K. Jack, Esq., of counsel).

***ISSUE***

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

II. Whether penalties assessed against petitioner should be abated.

***FINDINGS OF FACT***

1. On April 2, 2004, petitioner and Joseph M. Scotti and Thomas Smario entered into an Operating Agreement (the Agreement) for the formation of a limited liability company known as New Road One, LLC (the LLC), in order to own and operate a Red Robin Restaurant. The restaurant operated under the trade name Red Robin Gourmet Burgers & Spirits, and the address of the restaurant was 14 Crystal Run Crossing, Middletown, New York 10941.

2. The Agreement provided that Messrs. Scotti and Smario and petitioner were to be the “Managing Members” but stated more particularly that Joseph M. Scotti “is the Financial and Administrative Managing Member in charge of all the financial operations of the company, as well as the administrative matters;” that Thomas Smario “is the Managing Member designated as the construction manager, who will oversee the building and the improvements and general repairs and maintenance of the operation;” and that petitioner “is the Managing Member in charge of the daily operations of the company, which include the operation of the actual restaurant which includes directing, managing the staff available for food and beverage, consultants, systems, cleaning and maintenance.”

3. Pursuant to the Agreement, each managing member was to contribute \$1,000.00 to the capital of the LLC and each managing member was to own a 33 1/3% interest. However, a Summary of Receipts as of November 1, 2004 indicated that Joseph M. Scotti had contributed \$184,300.00, Thomas Smario had contributed \$62,000.00 and petitioner had contributed nothing to the LLC.

Mr. Scotti indicated to the other Managing Members that he had adequate funds to begin construction of the restaurant, which ended up costing nearly \$4,000,000.00, but that proved not to be the case. Therefore, other investors had to be found. The November 1, 2004 Summary of

Receipts indicated that a number of other persons had become investors in the LLC. As a result thereof, as of November 1, 2004, the interest of petitioner and the other principals (Joseph M. Scotti and Thomas Smario) had been reduced to 24.17% each.

4. The Agreement provided that the Financial Managing Member (Mr. Scotti) would, among other things, “prepare or cause to be prepared all Federal, State and local income tax and information returns for the Limited Liability Company, and shall cause such tax and information returns to be filed timely with the appropriate governmental authorities.”

5. The Agreement stated that all books and records and tax and information returns were to be maintained at the principal place of business of the LLC which was 322 President Street, Brooklyn, New York, the home address of Joseph M. Scotti.

6. Petitioner joined with Messrs. Scotti and Smario on the condition that he would not be involved in raising funds and that he would not be responsible for financial duties on behalf of the LLC. While petitioner did not initially make any monetary investment in the LLC, he later loaned the LLC the sum of \$15,000.00 (which was the extent of his savings) to cover payroll. This loan was to be repaid within two weeks after its advance; however, it was never repaid. In addition to petitioner’s savings, his family and friends invested more than \$900,000.00 which was lost in the LLC venture.

7. Because of his previous experience in the restaurant business, petitioner’s function was to oversee the restaurant’s managers who were to operate the restaurant in Middletown. Petitioner hired the managers who then hired the other employees. In his position as supervisor of the restaurant managers, petitioner visited the restaurant once or twice weekly.

The managers made direct deposits into the bank twice daily and all bank statements and information went to Mr. Scotti who had the LLC’s checkbooks in his possession.

8. The restaurant opened in March 2005. However, the LLC had difficulty paying construction creditors, and investors were not getting the profit and loss reports as required by the Agreement. As a result, it became exceedingly difficult to raise money.

9. When the restaurant opened, petitioner, because of his previous experiences reminded Mr. Scotti that it was imperative to file timely tax returns and pay the LLC's tax liabilities since the failure to do so would result in the imposition of interest and penalties. On several occasions, petitioner asked Mr. Scotti for copies of the sales tax returns, but he did not receive the copies as requested. In addition, petitioner asked for bank reconciliation statements because "I was getting a little nervous and we didn't get those for a long time and when we got them, they were not legible."

10. Petitioner had no role in the preparation of the LLC's sales tax returns. Each of the sales tax returns for the period at issue was signed by Joseph Scotti, Member.

For the sales tax quarter ended May 31, 2005, the LLC reported sales tax due in the amount of \$70,012.31, but paid only \$4,862.31, thereby leaving a balance due of \$65,150.00.

For the sales tax quarter ended August 31, 2005, the LLC reported sales tax due in the amount of \$65,111.00, but had total tax credits and advance payments totaling \$44,908.00, thereby leaving a balance due of \$20,203.00. Attached to the return were copies of eight checks, all of which were dated September 15, 2005, totaling \$20,053.00. These checks bore what appears to be the signature of Joseph Scotti, who signed the sales tax return.

For the sales tax quarter ended November 30, 2005, the LLC reported sales tax due of \$50,683.00, but had total tax credits and advance payments totaling \$33,872.00, thereby leaving a balance due of \$16,661.00. Attached to the return were copies of two checks, dated

December 15, 2005, totaling \$5,661.00. The checks bore what appears to be the signature of Joseph Scotti, who signed the sales tax return.

11. On May 22, 2006, the Division issued three notices of determination to petitioner that advised him that he was being assessed as an officer or responsible person of New Road One, LLC.<sup>1</sup> The notices assessed as follows:

Period Ended	Tax	Interest	Penalty	Payments/Credits	Total
05-31-05	65,150.00	8,546.76	13,281.50	17,500.00	69,478.26
08-31-05	65,111.00	7,228.63	12,394.11	0.00	84,733.74
11-30-05	26,150.00	1,747.41	4,072.50	0.00	31,969.91

12. Petitioner had check signing authority on behalf of the LLC; however, he signed only six to ten checks in total, drawn on one of the business's checking accounts, and signed these checks only when Mr. Scotti was on vacation.

13. In 2004, petitioner began undergoing radiation implantology for prostate cancer. On July 21, 2006, petitioner went into cardiac arrest and was taken to the hospital where he was resuscitated and implanted with a pacemaker. After approximately two weeks in the hospital, petitioner notified Messrs. Scotti and Smario that he could no longer tolerate the extreme stress of the business and he, therefore, separated himself from the operation.

14. In the fall of 2006, bankruptcy proceedings on behalf of the LLC were commenced and the restaurant closed.

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<sup>1</sup> Based upon the sales tax returns filed, the credits claimed and the copies of the checks attached to the returns, it is unclear how the amounts of tax assessed by the notices of determination were calculated.

**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 Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]; *Matter of 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]).

C. In *Matter of Taylor* (Tax Appeals Tribunal, October 24, 1991), the Tribunal summarized the standards for determining whether an individual falls within the category of responsible person as follows:

Whether a person is a "responsible officer" under Articles 28 and 29 of the Tax Law is determined by Tax Law §§ 1131(1) and 1133(a), which articulate who may be held personally liable for the collection and remittance of sales tax. Section 1131(1) sets forth, in relevant part, that "any officer, director or employee of a corporation or of a dissolved corporation . . . who . . . is under a duty to act for such corporation . . . in complying with any requirement of [Art. 28]" of the sales tax law is also responsible for collecting and paying over taxes due by the corporation (emphasis added). The responsible officer incurs personal liability through section 1133(a) of the Tax Law which holds 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."

Case law makes clear that the mere holding of a corporate office does not, in and of itself, impose tax liability on a person (see, Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 430; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Rather, whether a person is a "responsible officer" required to collect sales and use taxes is a factual determination (see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State, 82 Misc 2d 181, 368 NYS2d 448; Chevlowe v. Koerner, supra, 407 NYS2d 427, 429; Matter of Hall, Tax Appeals Tribunal, March 22, 1990; Matter of Martin, Tax Appeals Tribunal, July 20, 1989, affd., 558 NYS2d 239; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). This factual determination, according to the Division's regulations, generally depends upon whether the person is authorized to sign the corporation's tax returns, is in charge of maintaining corporate records, or is responsible for managing the corporation (20 NYCRR 526.11[b][2]). A study of the relevant case law suggests consideration of the following indicia of responsibility in a "responsible officer" determination: status as an officer, director, or stockholder (Matter of Cohen v. State Tax Commn., supra, 513 NYS2d 564, 565); the derivation of substantial income from the corporation or stock ownership (Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536); day-to-day responsibilities, involvement with and knowledge of the financial affairs and management of the corporation, as well as the individual's duties and functions set forth in the certificate of incorporation and bylaws (Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d 862, 865); ability to hire and fire employees (Chevlowe v. Koerner, supra, 407 NYS2d 427, 429); and authorization to sign the corporate tax returns and checks (Matter of Cohen v. State Tax Commn., supra; Chevlowe v. Koerner, supra, 407 NYS2d 427, 429).

D. In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the Tribunal, in holding that an officer and shareholder was not a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133, stated:

petitioner's role was essentially that of a minority investor and supervising employee who was precluded from taking action with regard to the financial and management activities of the corporation.

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The significance of petitioner's officer and shareholder status in the determination of responsibility is offset by the circumstances relating to control of the corporation which are present here. Petitioner lacked the power to exercise the tax collection responsibilities on behalf of the corporation. The evidence does not support a conclusion that petitioner could have acted but chose not to.

E. In the present matter, the credible testimony of petitioner established that like *Constantino*, petitioner's role was as a minority investor who was precluded from taking action with regard to the financial and management activities of the LLC. The Agreement stated that Joseph M. Scotti was in charge of all of the financial operations and administrative matters pertaining to the LLC and that petitioner was to manage the staff involved in the operation of the restaurant. The Agreement further stated that the Financial Managing Member (Mr. Scotti) would prepare or cause to be prepared all tax returns for the LLC and would cause the returns to be filed timely with the appropriate governmental authorities. All books and records as well as tax and information returns were to be maintained at the LLC's principal place of business which was designated as the home address of Mr. Scotti.

The Summary of Receipts (*see* Finding of Fact 3) revealed that of the three Managing Members, Mr. Scotti contributed \$184,300.00, Mr. Smario contributed \$62,000.00 and petitioner contributed nothing to the LLC. While petitioner did not initially make any financial investments



in the LLC, he subsequently loaned the sum of \$15,000.00 to the LLC to cover payroll. While the loan was to be repaid within two weeks after its advance, it was never repaid.

Because of his previous experience in the restaurant business, petitioner's function was to oversee the managers of the restaurant. While he was involved in the hiring of these managers, it was the managers who hired the other employees. Petitioner was not involved in the day-to-day operation of the restaurant and visited it only once or twice weekly. The managers made the bank deposits and all bank statements and information went directly to Mr. Scotti who maintained the LLC's checkbook.

Due to his familiarity with the restaurant business, petitioner was aware of the necessity of timely filing tax returns and paying the restaurant's tax liabilities. On several occasions, he asked Mr. Scotti for copies of the LLC's sales tax returns, but he was not furnished the copies as requested. He also asked for the LLC's bank reconciliation statements, but was not supplied with the statements for long periods of time. When the bank reconciliation statements were given to petitioner, they were not legible.

Petitioner did not prepare nor did he sign the sales tax returns on behalf of the LLC; each of the returns was signed by Mr. Scotti. The checks for partial payment of the LLC's sales tax liability during the various sales tax quarters at issue were all signed by Mr. Scotti. While petitioner did have check signing authority on behalf of the LLC, he rarely signed checks, doing so only when Mr. Scotti was unavailable.

The restaurant was in operation only from March 2005 until the fall of 2006 when bankruptcy proceedings were commenced. During the period in which the restaurant was operational, petitioner was often seriously ill. He began undergoing radiation treatments for prostate cancer in 2004 and on July 21, 2006, he went into cardiac arrest, was resuscitated and

implanted with a pacemaker. Shortly thereafter, he notified the other Managing Members that, due to the extreme stress of the business, he needed to separate himself from it.

F. Clearly, while a Managing Member, petitioner was not an investor, was not involved in the day-to-day operation of the restaurant and was not responsible for the financial management of the business. While the record does not disclose what income, if any, petitioner received from the business, he did not invest money in the LLC as did the other two Managing Members, but was forced to loan money to the business as well as cause family and friends to invest more than \$900,000.00 which was lost in the venture. This was certainly not a case where petitioner could have acted, but chose not to do so. Petitioner did not shirk his duties as a Managing Member, but rather attempted to ascertain whether the LLC was current in its filing of sales tax returns and remitting its tax liabilities. However, he was thwarted in such attempts. As was the case in *Constantino*, petitioner lacked the power to exercise the tax collection responsibilities on behalf of the LLC and, therefore, cannot be held to have been a person responsible for the collection and payment of sales tax on behalf of the LLC.

G. By virtue of the holding in Conclusion of Law F, Issue II is rendered moot.

H. The petition of Joseph P. Santo is granted and the three notices of determination issued to him on May 22, 2006 are hereby canceled.

DATED: Troy, New York  
March 12, 2009

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE