

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CONNIE F. MITCHELL	:	DETERMINATION
		DTA NO. 822072
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, 2003 through February 29, 2004.	:	

Petitioner, Connie F. Mitchell, 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, 2003 through February 29, 2004.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 27, 2009 at 10:30 A.M., and continued to completion on January 28, 2009 at the same location, with all briefs to be submitted by August 28, 2009, which date began the six-month period for the issuance of this determination.¹ Petitioner appeared by White & Case, LLP (Kathleen Pakenham, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael Hall, of counsel).

ISSUES

I. Whether the taxes asserted against petitioner were satisfied by the Stipulation and Order Resolving Claim Numbers 3325 and 3326 and Determining Debtors' Tax Liabilities to State of

¹ Petitioner filed a motion for summary determination on January 26, 2009. Pursuant to 20 NYCRR 3000.9(c) and CPLR 3212(a), the motion for summary determination was late filed.

New York entered by the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, on April 7, 2006.

II. Whether petitioner was personally liable for the sales and use taxes due on behalf of Telco Billing, Inc., as a person required to collect and pay such taxes under Tax Law §§ 1131 and 1133.

FINDINGS OF FACT

Pursuant to section 3000.15(d)(6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal and section 307(1) of the State Administrative Procedure Act, petitioner submitted proposed findings of fact. The proposed findings of fact have been substantially incorporated into this determination with exceptions noted in the final finding of fact.

1. On December 1, 2006, the Division of Taxation (Division) issued to petitioner, Connie F. Mitchell, a Notice of Determination that assessed \$70,265.74 in sales and use taxes due, plus penalty and interest, for the period September 1, 2003 through February 29, 2004. The notice indicated that Ms. Mitchell was being held liable as an officer or responsible person of Telco Billing, Inc. (Telco Billing).

2. A. Joe Mitchell, Jr., petitioner, Ray Atkinson, Joseph Fail and two other individuals founded VarTec Telecom, Inc. (VarTec Telecom) in 1989. Mr. Fail, owner of Telephone Electronics Corporation (TEC), a Jackson, Mississippi-based provider of telephone services to rural communities since 1923, put forward 80 percent of the capital necessary to start VarTec Telecom, and the Mitchells provided the other 20 percent. TEC set up VarTec Telecom's accounting functions so that VarTec Telecom's financial information was available to TEC, which included VarTec Telecom in its consolidated federal income tax returns. During the period September 1, 2003 through February 29, 2004, TEC owned 80 percent of VarTec

Telecom, Joe Mitchell owned 12 percent, and the remaining 8 percent was in a trust for departed employees and officers. During the period at issue, Ms. Mitchell owned no stock or interest in VarTec Telecom. TEC's consolidated federal income tax returns for the years 2003 and 2004 included VarTec Telecom and its subsidiaries.

3. Initially, VarTec Telecom was a value-added reseller of inexpensive long distance telephone calls. Specifically, a customer received low, flat rates on long distance telephone calls by dialing VarTec Telecom's access code, initially 10-811 and later 1010-811. VarTec Telecom handled the long distance telephone calls through its access code, at a rate agreed upon between the customer's local exchange carrier and VarTec Telecom. The customer would be billed by the local exchange carrier for the long distance telephone calls.

4. Over time, VarTec Telecom expanded its telecommunication service offerings and acquired other companies. In 2001 and 2002, VarTec Telecom acquired Excel Telecommunications, Inc. (Excel) and its subsidiaries from Bell Canada. Excel's business structure included a multilevel marketing group with approximately 10,000 contractors. Excel's sales arm was eMeritus Communications, Inc. (eMeritus), which in turn owned Telco Billing, eMeritus's billing entity. eMeritus made business to business sales, which were billed and collected by Telco Billing. Ernst & Young was hired to assist in merging companies acquired by VarTec Telecom. After the Excel acquisition, VarTec Solutions, Inc. (VarTec Solutions), which was VarTec Telecom's wholly-owned Delaware subsidiary, wholly-owned Telco Billing, a Delaware corporation.

5. By 2003, VarTec Telecom operated in every state except Hawaii and in 17 foreign countries. Petitioner estimated that VarTec Telecom did almost \$2 billion in business and had an earnings before tax distributions of \$200 million in 2003. During the period September 1, 2003

through February 29, 2004, VarTec Telecom had almost 8,500 employees, and approximately 100 subsidiaries.

6. When VarTec Telecom was first formed, Mr. Mitchell and members of the Fail family constituted its board of directors. The Fail family selected board members for all VarTec entities until sometime prior to the period in issue. At some point prior to the period in issue, petitioner became a member of VarTec Telecom's board of directors. She was also a member of the board of directors of some VarTec Telecom subsidiaries.

7. Before VarTec Telecom was founded, petitioner, who holds a bachelor's degree in business education from Oklahoma State University, worked in education for 15 years. When VarTec Telecom first started, petitioner was responsible for human resources and customer service.

8. Prior to and during the period in issue, petitioner's official title was chief administrative officer (CAO) of VarTec Telecom. She was the executive vice president of human resources of VarTec Telecom, which included managing the hiring and training groups, and was also responsible for the back office operations, including purchasing and facilities management. After the acquisition of Excel, Ms. Mitchell oversaw over 200 million square feet of facilities. From the end of 2001, Ms. Mitchell's job focused on closing down redundant offices, and downsizing personnel. Although petitioner had the authority to hire and fire employees of VarTec Telecom and its subsidiaries, she delegated that authority to staff in VarTec Telecom's human resources department. During the period September 30, 2003 through February 29, 2004, about 50 people employed in VarTec Telecom's human resources department reported to petitioner. At the end of the period in issue, petitioner personally fired two people who answered

to VarTec Telecom's CEO, the CFO for Excel and his boss, because they were her peers and out of respect for them.

9. When VarTec Telecom acquired Excel in 2002, it sent a letter to all of Excel's employees informing them that their employment with Excel was terminated, and then immediately offered them a job at VarTec Telecom. A packet of benefit information was included with all employment offers. Ms. Mitchell's name was stamped on all of the employment offers that went out to those Excel employees. Petitioner estimated there were between 4,000 to 6,000 letters sent out under her name at that time.

10. Ms. Mitchell's role changed as VarTec Telecom grew. During the period at issue, Ms. Mitchell was doing less of her prior day-to-day activities. She took care of her five children and went on speaking tours throughout the United States and Europe, sometimes speaking in front of 10,000 people.

11. As executive vice president of human resources and a member of VarTec Telecom's board of directors, Ms. Mitchell never reviewed or prepared any sales tax returns. Like all board members, Ms. Mitchell would review the consolidated financial statements of VarTec Telecom and its subsidiaries. At the board meetings taxes were simply a one-line item and were not broken down into subsidiaries and the amount of sales tax owing. Budget information for human resources, facilities management and purchasing was prepared by a vice president and legal person in human resources who reported to Ms. Mitchell. Ms. Mitchell's areas of expertise on the VarTec Telecom board of directors were the budgets associated with people, facilities and world-wide purchases.

12. Petitioner was never authorized to sign any checks on behalf of VarTec Telecom, VarTec Solutions, Telco Billing, or any of the approximately 100 VarTec Telecom entities.

Instead, Joe Mitchell, the chief executive officer (CEO) and founder of VarTec Telecom, was authorized to sign all checks and had a check-signing machine petitioner could not access. The check-signing machine was kept in the office of VarTec Telecom's chief financial officer (CFO).

13. Petitioner was never part of VarTec Telecom's well-defined financial reporting chain. In addition to its own CFO, VarTec Telecom also retained CFOs of the companies it acquired. The CFOs of the acquired companies would report to the CFO of VarTec Telecom, who in turn reported to Robert Healea, the CFO of TEC.

14. During the period September 1, 2003 through February 29, 2004, the CFO of VarTec Telecom was Kevin McAleer. As CFO, Mr. McAleer was the person ultimately responsible for the preparation of tax returns, tax payments, and financial statements. He was also responsible for responding to the requests of any taxing authority. Mr. McAleer never reported to Ms. Mitchell, nor did Ms. Mitchell ever report to Mr. McAleer.

15. Ms. Mitchell's job description did not include reviewing, signing, preparing, or being in any way involved with VarTec Telecom's state sales tax returns. She did not supervise the work of any employees who prepared the tax returns and did not have any tax return preparers reporting to her. The preparation of the sales tax returns was the responsibility of the CFOs of the different entities and, ultimately, Mr. McAleer as VarTec Telecom's CFO.

16. During the period September 1, 2003 through February 29, 2004, VarTec Telecom's CEO, Mr. Mitchell, had the following reporting directly to him: petitioner, the CAO; Mr. McAleer, the CFO; Michael Hoffman, the chief legal officer; Ron Hughes, the chief operating officer (COO) who handled network operations; and Ray Atkinson, a vice president in charge of marketing and sales. Officers of VarTec Telecom were paid by VarTec Business Trust.

17. Annual reports filed with the Commonwealth of Virginia State Corporation Commission indicate that petitioner was a vice president and director of Telco Billing after VarTec Telecom acquired Excel and its subsidiaries. Mr. Hoffman, a vice president and secretary of Telco Billing, executed and filed Telco Billing's annual reports with the Commonwealth of Virginia State Corporation Commission for the years 2003 and 2004 in January 2003 and January 2004, respectively.

18. During the period at issue, Ms. Mitchell was unaware she was on the board of Telco Billing. She never attended any Telco Billing board meetings or signed anything stating that she was on the board. She did not realize she was on the board until she received audit documents from the Division, and subsequently she told the Division that she did not know if she was an employee of Telco Billing.

19. Telco Billing did not have any employees, and petitioner never had any management responsibilities at Telco Billing. She never signed any checks on behalf of Telco Billing, VarTec Telecom, or any other related entity, nor did she have the authority to do so.

20. Telco Billing filed New York State sales and use tax returns and paid tax for the period September 1, 2001 through February 29, 2004. Shirley Garrett, a tax supervisor in VarTec Telecom's tax department, signed Telco Billing's sales tax returns for periods including September 1, 2003 through February 29, 2004. She was hired by VarTec Telecom in 2002 during the acquisition of Excel; Ms. Garret had been an employee of either Excel or one of its subsidiaries at that time.

21. Ms. Mitchell was diagnosed with malignant melanoma for the first time in 2001. She was diagnosed with the same cancer three more times before she retired in 2004. She was told that the cancer was of such a serious nature that within two months it could be fatal. Ms.

Mitchell's treatment consisted of cutting the cancerous growth out of her skin until the tissue tested healthy; this meant cutting out four inches of muscle from the back of her leg. She had the treatment more than four times on both her arms, which resulted in her losing the use of her right arm for two years.

22. Due to her disabling illness, most of Ms. Mitchell's duties during the period at issue were transferred to VarTec Telecom's COO. She had to use all the sick leave that she had accumulated over ten years. The exact dates of such sick leave use are not part of the record. Ms. Mitchell's pain was severe enough that she was prescribed medication which made her unable to even read her name.

23. According to petitioner, she attempted to formally resign from her position as an executive vice president of VarTec Telecom and her board positions on VarTec Telecom entities sometime in March 2004, because of her deteriorating health. A copy of her written resignation is not part of the record. Due to personnel needs during VarTec Telecom's restructuring, she continued to be VarTec Telecom's executive vice president of human resources until sometime in May 2004. At a meeting held on August 29, 2004, VarTec Telecom's board of directors formally removed petitioner from all officer and director positions and all other capacities with VarTec Telecom and "any and all of" its worldwide subsidiaries effective as of August 30, 2004. At the same meeting, VarTec Telecom's board of directors also formally removed Mr. Mitchell, Stan Springel, Joe D'Angelo and KJ Alzamora from all officer and director positions and all other capacities with VarTec Telecom and "any and all of" its worldwide subsidiaries effective as of August 30, 2004. Additionally, the board of directors formally removed Mr. Mitchell "from all positions of employment with [VarTec Telecom] and all of [VarTec Telecom's] subsidiaries" effective as of September 3, 2004.

24. On October 26, 2004, Telco Billing was merged into its parent VarTec Solutions and ceased to exist as a separate entity as of October 31, 2004. All appropriate corporate filings were made with the State of Delaware.

25. On November 1, 2004, VarTec Telecom and all its related entities, including VarTec Solutions, filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (Bankruptcy Court). The record includes a copy of the Statement of Financial Affairs, dated December 17, 2004, filed by VarTec Solutions, as the debtor, with the Bankruptcy Court. In response to question 18 on this financial affairs statement, VarTec Solutions listed the name, nature and beginning and ending dates of the following businesses in which it “was a partner or owned 5 percent or more of the voting or equity securities within six years immediately preceding the commencement” of the bankruptcy case: Prime Business Communications, Inc., telecommunications, December 9, 1997 through October 31, 2004; Telco Billing, inactive, January 1, 1997 through October 31, 2004; Long Distance Wholesale Club, inactive, January 1, 1997 through October 31, 2004; and Telco Network Services, network company, January 1, 1997 through current.

26. In or about April 2004, the Division commenced a joint sales and corporate (Tax Law, art. 9, §186-e) tax audit of VarTec Telecom, Excel Telecommunications, eMeritus, Long Distance Wholesale Club and Telco Billing. The Division assigned Christopher Gburek, an auditor in the Division’s Buffalo District Office (district office), to conduct the sales tax audit of the five telecommunication entities.

27. By letter dated May 27, 2004, the Division confirmed that all five corporations agreed to participate in a joint sales and corporate tax audit. The letter further advised that the joint

audit of the five corporations would commence with field appointments at their offices on July 27, 2004 through July 30, 2004 and that separate appointment letters, specifying the records requested for sales and use tax and corporation tax audits, were attached. This letter was addressed to Mr. Tim Fewell, VarTec Telecom, Tax Department, Dallas, Texas.

28. The May 27, 2004 appointment letter addressed to Telco Billing, Dallas, Texas, requested that all books and records pertaining to its sales and use tax liability, for the period September 1, 2001 through February 29, 2004, be available for a field audit beginning July 27, 2004.

29. During a telephone call initiated by Mr. Gburek on June 15, 2004, Mr. Fewell requested a delay in the joint audits of the five corporations because they needed more time to coordinate personnel and the information requested. The field appointment for the joint audits of the five corporations was orally rescheduled for November 1, 2004 through November 6, 2004.

30. The field appointment for the joint audit of the five corporations commenced on November 2, 2004 and continued through November 5, 2004 at VarTec Telecom's Dallas, Texas, offices. At the initial meeting on November 2, 2004, Mr. Gburek, and three other Division auditors, discussed the manner in which the audit of the five corporations would begin with Mr. Fewell, Ms. Garrett, and VarTec Telecom corporate tax and computer personnel. The Division was informed that VarTec Telecom and its related entities had filed for bankruptcy protection on November 1, 2004 at that initial meeting. Some documentation, including copies of tax returns, copies of consolidated support schedules for federal returns, and copies of a couple of telephone bills issued by eMeritus to its customers, was provided to the auditors for review during that initial meeting. With respect to Telco Billing, Mr. Gburek was provided with copies of the sales tax returns for the audit period.

31. During his four-day site visit, Mr. Gburek requested additional documentation for each of the five corporations under audit. With respect to Telco Billing, Mr. Gburek requested supporting documentation for the sales reported on its sales tax returns, copies of bills issued to its customers during the audit period, and the completion of a responsible officer questionnaire. None of the requested Telco Billing documentation was provided to Mr. Gburek during his site visit.

32. The record includes copies of VarTec Telecom's Tax Field Audit Record (VarTec Telecom's audit log) and Telco Billing's Tax Field Audit Record (Telco Billing's audit log). Review of VarTec Telecom's audit log indicates that, upon his return to the district office, Mr. Gburek reviewed the telephone bills supplied and began tax calculations for each of the five corporations, in case the Division received the bankruptcy bar notification date prior to receipt of additional information from the corporations. According to VarTec Telecom's audit log, Mr. Gburek received notice of the bankruptcy bar date on November 22, 2004 from his team leader and section heads, completed his final sales tax calculations for each of the corporations on February 22, 2005, and forwarded the same to the Division's Bankruptcy Unit on February 23, 2005. An entry in Telco Billing's audit log confirms that Mr. Gburek prepared and reviewed that corporation's final tax calculation for bankruptcy on February 22, 2005.

33. Since Telco Billing did not supply any supporting documentation, Mr. Gburek used the two eMeritus telephone bills to calculate an error ratio of 151.737996%,² applied the same to the gross sales totaling \$3,698,181.00, reported by Telco Billing on its sales tax returns for the audit period, and determined additional tax due in the amount of \$481,262.74 for the period

² The error ratio of 151.737996% was determined by dividing \$127.23, the tax calculated as due on the two bills by the Division, by \$83.85, the tax paid on the two bills.

September 1, 2001 through February 29, 2004. This amount was reflected in the Statement of Proposed Audit Change for Sales and Use Tax, dated April 21, 2005, issued to Telco Billing. The Statement of Proposed Audit Change also asserted interest due, along with penalties in the amount of \$188,262.95.

34. Mr. Gburek also prepared statements of proposed audit change for sales and use tax for the other corporations under audit. Review of VarTec Telecom's audit log indicates that Mr. Gburek mailed to VarTec Telecom the statements of proposed audit change issued to all the corporations, the work papers, and a cover letter on April 21, 2005.

35. In a letter dated May 20, 2005, Neil P. Keeter, Senior Director of Tax for VarTec Telecom, disagreed with the Statement of Proposed Audit Change issued to Telco Billing because the "arbitrary assessment" was estimated without review of relevant information, and additional information could be provided that would allow New York State to determine a legitimate assessment, if one was merited. Mr. Keeter, in his letter, advised that Telco Billing was merged into VarTec Solutions effective October 31, 2004. He also advised that VarTec Telecom and its subsidiaries, including Telco Billing, filed for Chapter 11 bankruptcy protection in the Northern District of Texas on November 1, 2004, and any request for an informal hearing was made pursuant to any relevant laws governing bankruptcy. Mr. Keeter also supplied the Bankruptcy Court's joint administration case number in this letter.

36. Entries in VarTec Telecom's audit log indicate that Mr. Keeter sent letters disagreeing with the audit results for all the corporations. Further review of VarTec Telecom's audit log indicates that Mr. Gburek requested additional documentation for Telco Billing and the other corporations from Mr. Keeter and Ms. Garrett during a June 28, 2005 conference call, and sent a written information request on July 1, 2005. Some additional documentation related to, among

other corporations, Telco Billing was submitted by VarTec Telcom on July 5, 2005. The auditor reviewed the additional documentation and determined it was inadequate. In a letter dated July 21, 2005, the auditor requested all records for the year ended 2003 pertaining to the different systems of direct billing and all local exchange carriers that provided service in New York State to the five corporations, including Telco Billing, under audit. A deadline of August 5, 2005 was set for the submission of the records requested in the July 21, 2005 letter. An entry in VarTec Telecom's audit log indicates that some documentation related to Telco Billing was received on August 19, 2005.

37. On August 22, 2005, the Division issued a Notice of Determination (L-025981580-2) to Telco Billing asserting \$481,262.74 in sales and use tax due, plus penalty and interest, for the period September 1, 2001 through February 29, 2004. The computation section of this notice stated that "[s]ince you have not submitted adequate records for audit, as required under sections 1135 and 1142 of the Tax Law, we determined that you owe tax, interest, and any applicable penalties, under sections 1138 and 1145 of the Tax Law, based upon available records and information."

38. On October 31, 2005, the Division's Bankruptcy Unit filed a Pre-Petition Proof of Claim against Excel Telecommunications and Long Distance Wholesale Club in Bankruptcy Court for tax liabilities (corporate and sales) in the total amount of \$8,330,926.97. On the same date, the Division's Bankruptcy Unit also filed a Pre-Petition Proof of Claim against VarTec Solutions in the Bankruptcy Court for tax liabilities (corporate and sales) in the total amount of \$2,654,218.86. In addition to corporate assessments, this claim also listed a sales tax assessment (Notice No. L-026221841-8) issued to VarTec Solutions for the period ended February 28, 2002.

Each Pre-Petition Proof of Claim bore the following statement at the bottom of the page “[t]his claim amends and supercedes the previous claim dated 5/2/2005.”³

39. The Bankruptcy Court assigned claim number 3325 to the Division’s claim against Excel Telecommunications and Long Distance Wholesale Club, and claim number 3326 to the Division’s claim against VarTec Solutions. On or about February 1, 2006, the debtors, VarTec Telecom and all its related entities, filed Claims Objection Number 9 Objection to Certain Tax Claims (Substantive Objections) to object to, among others, claim numbers 3325 and 3326.

40. On April 7, 2006, the Hon. Harlin DeWayne Hale signed, and the Bankruptcy Court Clerk entered, a Stipulation and Order Resolving Claim Numbers 3325 and 3326 and Determining Debtors’ Tax Liability to State of New York (Order). As part of the Order, the Division agreed that claim number 3325 would be reduced with prejudice and allowed as (a) a general unsecured claim in the amount of \$39,726.75 against Excel Telecommunications’s bankruptcy estate and (b) an unsecured priority claim in the amount of \$126,455.17 against Excel Telecommunications’s bankruptcy estate, and claim number 3326 would be reduced with prejudice and allowed as (a) a general unsecured claim in the amount of \$10,032.00 against VarTec Solutions’s bankruptcy estate and (b) an unsecured priority claim in the amount of \$16,085.00 against VarTec Solutions’s bankruptcy estate (the stipulated claims). The Division also agreed that all claims filed by it which had been the subject of prior orders by the Bankruptcy Court were properly disallowed and expunged, and it would not challenge, on any grounds, any prior orders of the Bankruptcy Court, nor reassert any prepetition claims. It was further ordered that all prepetition claims filed by the Division would be disallowed in their

³ The Bankruptcy Court established May 2, 2005 as the governmental unit bar date, i.e., the last day by which any governmental unit holding or asserting a claim must have filed a proof of claim for such claim to have been timely filed.

entirety in these cases, expunged from the claims register, and replaced with the amount of stipulated claims.

41. Review of Telco Billing's audit log shows that on March 24, 2006, Mr. Gburek asked a member of the Division's Bankruptcy Unit whether Telco Billing's claim was filed with the Bankruptcy Court or was lost. The Bankruptcy Unit's response, if any, was not noted in Telco Billing's audit log.

42. A review of Telco Billing's Field Audit Report (audit report) indicates that a request for a conciliation conference was filed with the Division's Bureau of Conciliation and Mediation Services (BCMS). However, the BCMS conciliation conference scheduled for April 17, 2006 never took place because it was "canceled by taxpayer informed company no longer exists." The auditor also noted, in the audit report, that of the five corporations audited, Telco Billing was the only corporation that had not filed for bankruptcy protection. The basis for this notation was not set forth in the audit report.

43. No responsible officer questionnaire was completed for Telco Billing.

44. None of Telco Billing's sales tax returns reviewed by the auditor were prepared or signed by petitioner. The auditor also did not see any checks written on behalf of Telco Billing that were signed by petitioner.

45. As noted above, on December 1, 2006, the Division issued a Notice of Determination to petitioner, which asserted that she was personally liable, as a responsible person, for additional sales and use taxes due from Telco Billing for the period September 1, 2003 through February 29, 2004. The audit file shows that Mr. Gburek identified several responsible persons during the course of Telco Billing's audit, none of whom was Ms. Mitchell. Mr. Gburek later determined

that Ms. Mitchell was a responsible person based upon a LexisNexis report and several internet articles.

46. Petitioner submitted proposed findings of fact numbered 1 through 29. The following proposed findings of fact are unsupported by the record and are therefore rejected: 1, 4, 6, 13, 20, 21, 24 and 28. In ruling on petitioner's proposed findings of fact, if any part of a proposed finding is unsupported by the record the proposed finding has been rejected in its entirety.

CONCLUSIONS OF LAW

A. Petitioner contends that Telco Billing's asserted prepetition tax liability was satisfied by the Order entitled "Stipulation and Order Resolving Claim Numbers 3325 and 3326 and Determining Debtors' Tax Liabilities to State of New York," which was signed by the Hon. Harlin DeWayne Hale and entered by the Bankruptcy Court Clerk on April 7, 2006. She maintains that by the terms of the Stipulation and Order, the Division agreed to compromise all claims it could have brought against VarTec Solutions during bankruptcy proceedings. Petitioner further maintains that the Stipulation and Order mandated that "all prepetition claims filed by Taxing Authority shall be disallowed . . . , expunged . . . , and replaced with the amount of the Stipulated Claims." She asserts that by its very terms the Order did more than simply resolve claim numbers 3325 and 3326, it also determined the debtors' tax liabilities to the State of New York. Relying upon *Matter of Trachtenberg v. New York State Tax Commn.* (107 AD2d 57, 485 NYS2d 621 [1985]), petitioner further argues that the responsible person liability asserted against her was satisfied when VarTec Solutions and the Division reached a settlement satisfying all prepetition tax liabilities, including the prepetition tax liability asserted against Telco Billing.

Petitioner's reliance upon *Matter of Trachtenberg v. New York State Tax Commn.* is misplaced. In *Trachtenberg*, the New York State Tax Commission reached a settlement with the

trustee of creditors of the corporation whereby the New York State Tax Commission agreed to accept a lesser amount than it had asserted in its claims against the corporation during bankruptcy proceedings. Pursuant to an order of the Bankruptcy Court, payment by check of the reduced amount was made. The New York State Tax Commission then asserted that Mr. Trachtenberg, as a responsible person, still owed a balance because the payment by the corporation's bankruptcy trustee did not constitute a total settlement, but merely a partial payment. The court held that because the corporation's debt had been fully settled, the Division's assertion of deficiency against Mr. Trachtenberg lacked a rational basis and the deficiency asserted against Mr. Trachtenberg was annulled. In the instant matter, the auditor prepared sales tax calculations for all five corporations under audit, including Telco Billing, and forwarded the same to the Division's Bankruptcy Unit for further action. The record shows that the Division's Bankruptcy Unit filed claims against Excel Telecommunications, Long Distance Wholesale Club, and VarTec Solutions for tax liabilities in Bankruptcy Court on May 2, 2005, the governmental unit bar date, and amended claims against those corporations in the Bankruptcy Court on October 31, 2005. The Bankruptcy Court assigned claim number 3325 to the Division's amended claim against Excel Telecommunications and Long Distance Wholesale Club, and claim number 3326 to the Division's amended claim against VarTec Solutions. Unlike ***Trachtenberg***, the Order entered by the Bankruptcy Court on April 7, 2006 covered those assessments listed on claim numbers 3325 and 3326, all claims filed by the Division that were the subject of prior orders of the Bankruptcy Court, and all prepetition claims against the debtors filed by the Division with the Bankruptcy Court. It is noted that claim number 3326 covered corporate assessments and a sales tax assessment for the period ended February 28, 2002 issued against VarTec Solutions. The Division did not file prepetition claims against Telco Billing or its surviving parent, VarTec

Solutions, for the sales tax assessment issued against Telco Billing for the period September 1, 2001 through February 29, 2004 in the Bankruptcy Court. Since the Order entered by the Bankruptcy Court did not satisfy the sales tax liabilities owed by Telco Billing for the period September 1, 2001 through February 29, 2004, petitioner remains liable for the full amount asserted against her if she is found to be a responsible person for Telco Billing.

B. 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]).

C. 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 the person was authorized to sign the corporate tax return, 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 D. Barton* [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin*, *supra*; *Matter of Autex*, *supra*).

D. 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).

E. The factors in this case indicate that petitioner was not a person under a duty and responsible to collect and remit sales and use taxes on behalf of Telco Billing, Inc. VarTec Telecom acquired Telco Billing as part of its purchase of Excel Telecommunications from Bell Canada in 2001 and 2002. At that time, Telco Billing became one of the many subsidiaries

owned by VarTec Telcom. Petitioner became a vice president and director of Telco Billing after its acquisition by VarTec Telecom. She never attended any board meetings or had any management responsibilities at Telco Billing, which had no employees. Telco Billing filed New York State sales and use tax returns and paid tax for the period September 1, 2001 through February 29, 2004. Shirley Garrett, a tax supervisor in VarTec Telecom's tax department, signed Telco Billing's sales tax returns for periods including September 1, 2003 through February 29, 2004. Ms. Garrett, an employee of Excel or one of its subsidiaries, was hired by VarTec Telecom in 2002 after its acquisition of Excel. In her role as VarTec Telecom's executive vice president of human resources, Ms. Mitchell's name was stamped on the 4,000 to 6,000 employment offers sent to Excel employees, including Ms. Garrett.

Petitioner credibly testified about her responsibilities at VarTec Telecom from its inception until her retirement in May 2004 because of deteriorating health. Although she was one of VarTec Telecom's founders, she did not own any of its stock during the period in issue. At VarTec Telecom's inception, petitioner was responsible for human resources and customer service. Prior to and during the period at issue, petitioner was the executive vice president of human resources and a director of VarTec Telecom. Her salary was paid by VarTec Business Trust, one of VarTec Telecom's subsidiaries. Petitioner's responsibilities at VarTec Telecom included managing the hiring and training groups, facilities management and world-wide purchasing. After the acquisition of Excel, petitioner oversaw over 200 million square feet of facilities. From the end of 2001, Ms. Mitchell's job focused on closing redundant offices, and downsizing personnel. While she had the authority to hire and fire employees of VarTec Telecom and its subsidiaries, she delegated that authority to staff in VarTec Telecom's human resources department. During the period at issue, that department's staff of approximately 50

people reported directly to her. At the end of the period at issue, petitioner personally fired two of her peers, out of respect for them. VarTec Telecom and its subsidiaries had a well-defined financial reporting chain, and well-defined duties for its corporate officers. Petitioner (VarTec Telecom's CAO), Kevin McAleer (VarTec Telecom's CFO), Ron Hughes (VarTec Telecom's COO), and two other officers reported directly to VarTec Telecom's CEO, Mr. Mitchell, during the period September 1, 2003 through February 29, 2004. In addition to its own CFO, VarTec Telecom also retained CFOs of the acquired companies. Those CFOs would report to the CFO of Var Tec Telecom, who in turn reported to Robert Healea, the CFO of TEC. Petitioner was not part of VarTec Telecom's well-defined financial reporting chain. Her responsibilities at VarTec Telecom did not include the preparation of tax returns for VarTec Telecom or any of its subsidiaries or the supervision of any employees who prepared such tax returns. She also was not authorized to sign any checks on behalf of VarTec Telecom, VarTec Solutions, Telco Billing, or any of the approximately 100 VarTec Telecom entities. Rather, VarTec Telecom's CFO was ultimately responsible for tax preparation, tax payments, responding to requests of any taxing authority, and financial statements. Joe Mitchell, the CEO and founder of VarTec Telecom, was authorized to sign all checks and had a check-signing machine to which petitioner had no access because it was kept in the office of VarTec Telecom's CFO.

In 2001, petitioner was diagnosed with malignant melanoma, which required painful surgical treatment. She was diagnosed with the same cancer three more times before she retired in May 2004. Due to her disabling illness, most of petitioner's duties during the period at issue were transferred to VarTec Telecom's chief operating officer. During the period September 1, 2003 through February 29, 2004, petitioner took care of her five children, managed her health issues, and did speaking tours on behalf of VarTec Telecom. Notwithstanding the fact that

petitioner was an officer and director of both VarTec Telecom and Telco Billing, it is clear that petitioner lacked the independent authority to act on behalf of either VarTec Telecom or Telco Billing during the period September 1, 2003 through February 29, 2004 (*Matter of Pessa*, Tax Appeals Tribunal, May 1, 1997).

Accordingly, petitioner was not a person responsible for the collection and payment of sales tax pursuant to Tax Law §1131(1) and §1133(a) and is not personally liable for the sales taxes due on behalf of Telco Billing, Inc. for the period September 1, 2003 through February 29, 2004.

F. The petition of Connie F. Mitchell is granted, and the Notice of Determination dated December 1, 2006 is canceled.

DATED: Troy, New York
February 25, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE