

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN KABACINSKI : DETERMINATION
for Revision of Determinations or for Refund of : DTA NO. 822924
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period September 1, 2006 through :
August 31, 2007. :
:

Petitioner, John Kabacinski, 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, 2006 through August 31, 2007.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 19, 2009 at 10:30 A.M., with all briefs to be submitted by April 9, 2010, which date began the six-month period for the issuance of this determination. Petitioner appeared by Michael J. Buxbaum, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. Bay Chevrolet, Inc., was an automobile dealership involved in the sale of new and used vehicles, parts and maintenance.
2. Bay Chevrolet, Inc., failed to timely file its New York State and local sales and use tax returns for the quarters ended November 30, 2006, February 28, 2007, May 31, 2007 and August 31, 2007.
3. On March 21, 2008, the Division of Taxation (Division) issued to petitioner, John Kabacinski, as an officer or responsible person of Bay Chevrolet, Inc., four notices of estimated determination assessing total sales tax due of \$1,298,245.08, plus penalty and interest, for the period September 1, 2006 through August 31, 2007.
4. On May 22, 2008, Bay Chevrolet, Inc., filed sales and use tax returns for the four quarters noted above but failed to pay in full the amount of sales tax due indicated on the returns.
5. Based upon the returns filed, the Division issued to petitioner as an officer or responsible person of Bay Chevrolet, Inc., four notices and demands for payment of tax due for the quarters ended November 30, 2006, February 28, 2007, May 31, 2007 and August 31, 2007 assessing sales tax due of \$74,407.14, \$52,043.23, \$41,895.20 and \$15,236.30, respectively, plus penalty and interest. These notices were improperly issued after the petition had been filed in this matter. They appear to have been issued solely to adjust petitioner's amount due.
6. In early 2005, petitioner was approached by a long-time friend, Michael Kieran, and asked if he would like to be an investor in an automobile dealership that his father, Patrick Kieran, was about to purchase. The automobile dealership eventually became Bay Chevrolet, Inc. Michael Kieran and his uncle, Owen Kieran, were also to be investors in the business.

Patrick Kieran had long been involved in dealerships, and petitioner thought it would be a sound investment. Petitioner invested approximately \$250,000.00 in the business venture.

7. Petitioner has a bachelor of science degree from the University of Scranton and was employed by Morgan Stanley full time in the computer information technology field as an integration engineer. He went to the dealership only to address computer problems, usually on a Saturday or Sunday. He received no salary and never received a return on his investment. He had no authority to hire and fire employees, did not participate in the daily operation of the business and had no involvement in the preparation of the sales tax returns or the payment of the sales tax due. All of the sales tax returns for the periods at issue were signed by the controller of the corporation. Patrick Kieran ran the business on a daily basis, and petitioner considered him to be the only one with authority to operate the business, to review its books and records and to determine and authorize the payment of creditors. Among Michael Kieran, Owen Kieran, Patrick Kieran and petitioner, only Patrick Kieran had a knowledge of the automobile business. He also was the only one of the four who was involved in Bay Chevrolet, Inc.'s daily operation and financial management.

8. Bay Chevrolet, Inc., had four separate bank accounts with JP Morgan Chase: a payroll account, an operating account, a motor vehicle account and a money market account. Petitioner had check signing authority on all four accounts as the vice-president of Bay Chevrolet, Inc. Petitioner signed few checks of the corporation and only at the direction of Patrick Kieran. On one occasion, petitioner stopped at the dealership at 6:00 A.M. on his way to work to sign payroll checks. Patrick Kieran was unavailable to sign the checks, and he directed petitioner to sign only the payroll checks that had been laid out on Mr. Kieran's desk.

9. Petitioner signed Bay Chevrolet, Inc.'s Application for Registration as a Sales Tax Vendor as president of the corporation. Patrick Kieran was not listed as an officer of the corporation on the application. Petitioner was directed to sign the application by Patrick Kieran and was told the business could not go forward unless he signed as president. Petitioner later learned that Patrick Kieran had certain tax difficulties and New York State would not have issued the sales tax registration for Bay Chevrolet, Inc., if Patrick Kieran was listed as its president.

10. The dealer statement of ownership filed by Bay Chevrolet, Inc., with General Motors Corporation indicated petitioner to be vice-president, active in the dealership, having voting rights and owning 25% of the corporation. On another form filed with General Motors requesting a name change for the dealership from Douglaston Chevrolet, Inc., to Bay Chevrolet, Inc., petitioner was listed as a "candidate" on behalf of the corporation.

11. Petitioner signed the corporation's 2005 U.S. Income Tax Return for an S Corporation, form 1120S, as vice-president. Petitioner was instructed to sign the return by both Patrick Kieran and the corporation's accountant. The return indicated a loss of \$239,829.00. Petitioner claimed a "non-passive" loss of \$79,943.00 on his New York State and federal personal income tax returns for the year 2005, both prepared by the same accountant.

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 [1979]; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427, 430 [1978]; *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 [1987]; *Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448 [1975]; *Chevlowe v. Koerner, supra*, 407 NYS2d 427, 429; *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, *affd*, 558 NYS2d 239 [1990]; *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 [1986], *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027 [1987]); 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.

* * *

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, similar to the situation in *Constantino*, petitioner's role was that of a minority investor who lacked the power to exercise the tax collection responsibilities on behalf of the corporation and was precluded from taking action with regard to the financial and management activities of Bay City Chevrolet, Inc. Petitioner was not involved in the day-to-day operation of the business and visited it only occasionally when computer problems arose. He lacked the authority to hire and fire employees. Patrick Kieran was in complete control of the daily operation, financial affairs and financial management of the dealership.

Petitioner did not prepare nor did he sign the sales tax returns on behalf of Bay Chevrolet, Inc.; each of the returns was signed by its controller. While petitioner did have check signing authority on behalf of the corporation, he rarely signed checks, doing so only when Patrick Kieran was unavailable and in accordance with his instructions.

Clearly, while an officer and investor, petitioner was not involved in the day-to-day operation of the dealership and was not responsible for the financial affairs and management of the business. He received no salary or return on his investment of \$250,000.00, which was lost in the venture. This was certainly not a case where petitioner could have acted, but chose not to do so. As was the case in *Constantino*, petitioner lacked the power to exercise the tax collection responsibilities on behalf of the corporation and, therefore, cannot be held to have been a person responsible for the collection and payment of sales tax on behalf of Bay Chevrolet, Inc.

F. It is noted that an affidavit offered into the record of this matter by petitioner on December 14, 2009, the day prior to the closing date of the record as indicated in the transcript,

was not considered in making this determination. The affiant does not provide the basis for the conclusory statements contained in the affidavit.

G. The petition of John Kabacinski is granted and the four notices of estimated determination, dated March 21, 2008, as modified by the four notices and demands dated August 10, 2009, are hereby canceled.

DATED: Troy, New York
September 30, 2010

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE