STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVID STEINBERG	:	DETERMINATION DTA NO. 822971
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 June 1, 2003 through November 30, 2005.	:	

Petitioner, David Steinberg, 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 June 1, 2003 through November 30, 2005.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals in New York, New York, on November 10, 2009 at 10:30 A.M., with all briefs to be submitted by March 19, 2010, which date began the six-month period for the issuance of this determination. Petitioner appeared by Meltzer, Lippe, Goldstein & Breitston, LLP (Laura E. Blasberg, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

Whether petitioner was properly held personally liable for the unpaid sales and use taxes owed by InPhonic, Inc., for the period June 1, 2003 through November 30, 2005 pursuant to Tax Law § 1131(1) and § 1133(a).

FINDINGS OF FACT

1. On February 25, 2008, the Division of Taxation (Division) issued to petitioner, David Steinberg, a Notice of Determination assessing sales and use taxes due in the amount of $18,503.70 for the sales tax quarterly periods spanning June 1, 2003 through November 30, 2005, plus interest. This notice indicates that petitioner was being held liable as an officer or person responsible to collect and remit sales and use taxes on behalf of Inphonic, Inc. (InPhonic). Petitioner does not challenge the dollar amount of tax assessed, or the audit methodology by which such amount was determined, but instead disputes only the Division's claim that he was an officer or person responsible to collect and remit taxes on behalf of InPhonic.[1]

2. Petitioner was the founder of InPhonic, an online entity that sold wireless phone devices and accessories, and which managed branded portals on behalf of major telephone carriers such as AT&T, Cingular, Verizon and T-Mobile, providing network access activation of the devices it sold pursuant to service contracts with the major carriers. Petitioner described InPhonic's revenues as resulting from fees from millions of small dollar activations and sales of devices and accessories.

3. InPhonic was a private company until its initial public offering in November 2004. Prior to InPhonic becoming a publicly traded company, petitioner owned or controlled 25 percent or more of its stock. After Inphonic became publically traded, petitioner's stock ownership or control level decreased to approximately 15 percent and later to approximately 10 percent.

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[1] The underlying assessment against InPhonic, from which the assessment against petitioner is derived, stemmed from an audit of InPhonic, that entity's execution of a Voluntary Disclosure Agreement with the Division and payment of tax pursuant to that agreement. Upon audit review of the agreement, the Division determined that a relatively small amount of additional tax ($1,483.34) remained due and unpaid based on Inphonic's collection but failure to remit tax and its failure to collect tax where required to do so, as well as additional tax ($16,878.71) due on InPhonic's receipts from shipping charges. The record does not specify or explain the $141.65 difference between the sum of the foregoing amounts ($18,362.05) and the amount of tax assessed against petitioner ($18,503.70) on the Notice of Determination.

4. Petitioner served as InPhonic's chief executive officer (CEO), chairman of its board of directors, and was a member of InPhonic's mergers and acquisitions committee. Petitioner acknowledged that he had responsibility for the day-to-day management of InPhonic, and he received monetary compensation for the services he rendered to InPhonic. In his positions as CEO and chairman of the board, it is undisputed that petitioner had access to InPhonic's books and records and was authorized to make bank deposits on behalf of InPhonic, sign tax returns and checks on its behalf, and hire and fire employees. Inphonic issued thousands of checks during the period in issue. Checks over a certain dollar amount, initially set at $50,000.00 and later increased to $100,000.00, required petitioner's signature in addition to that of another InPhonic employee. Under this dual signature protocol, petitioner signed checks that met or exceeded the requisite dollar threshold, including the payments made pursuant to the Voluntary Disclosure Agreement made with the Division.

5. InPhonic had an in-house tax department and also hired and relied upon outside accountants with regard to tax compliance and other matters. InPhonic's tax personnel reported to its chief financial officer (CFO) who in turn reported to petitioner. Petitioner hired the approximately eight persons at InPhonic who reported directly to him, and he recommended the person who was hired by the board of directors as Inphonic's CFO.

6. While not disputing that he had authority with respect to the operations of InPhonic, as described, petitioner maintained that given the size of the company and the volume of its transactions he could not as a practical matter personally oversee all aspects of Inphonic's operations. Instead, petitioner relied upon those who reported to him including, with regard to tax matters, InPhonic's CFO and its outside auditors and tax professionals. Petitioner also noted that as the result of the Sarbanes-Oxley Act of 2002 (***see*** 15 USC § 7201, et seq., Pub L 107-204

[2002 HR 3763, July 30, 2002], 116 Stat 745), InPhonic's internal audit functions and tax functions were handled by different outside firms (KPMG for audit work and Ernst & Young for tax work, respectively) and that his direct interaction with InPhonic's operating finance employees was discouraged if not prohibited.

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]). 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; ***see also Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998). One in a position of responsibility cannot escape the same by disregarding or delegating such responsibility to others. (***Matter of Ragonesi v. State Tax Commn.***, 88 AD2d 707; ***Matter of Blodnick v. State Tax Commn.***; ***Matter of Shah,*** Tax Appeals Tribunal, February 25, 1999).

D. Petitioner was clearly a person under a duty to act on behalf of the corporation to ensure that taxes such as those at issue were collected and remitted. Petitioner was CEO, chairman of the board of directors, and a major stockholder of InPhonic who had responsibility for the management of the company's operations, access to its books and records, authority to hire and fire employees, and authority to sign documents including checks and tax returns on

behalf of the company. He had supervisory authority and responsibility over InPhonic's financial staff. His decision to rely on others and not be directly involved in tax matters does not relieve him of liability (***Matter of Krone***, Tax Appeals Tribunal, September 15, 1991). It is true that InPhonic was a large company and that petitioner, as its chairman and CEO, had many responsibilities with respect thereto. However, there is no evidence that petitioner lacked authority, that information was deliberately withheld from him, that he was otherwise misled with respect to InPhonic's tax obligations, or that he was thwarted or precluded from participation in the corporate duties through no fault of his own. Accordingly, petitioner was a person responsible for the collection and payment of sales tax pursuant to Tax Law § 1131(1) and § 1133(a) and was properly determined to be personally liable for the sales taxes due on behalf of InPhonic for the period December 1, 2001 through November 30, 2005.[2]

E. The petition of David Steinberg is hereby denied and the Notice of Determination dated February 25, 2008, together with such interest as is lawfully owing, is sustained.

DATED: Troy, New York
September 9, 2010

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[2] The Sarbanes-Oxley Act of 2002 (The Act) does not insulate petitioner from the liability in question. As the Division points out in its brief, The Act aims to ensure the integrity of a company's financial reports and, among other things, requires the "principal officers" to take responsibility for, certify and approve the integrity of such reports, establish and maintain adequate internal control structure and procedures, and report (together with the company's external auditors) on the adequacy of internal controls over financial reporting. There is nothing in The Act which either precludes involvement by petitioner in the company's financial affairs or absolves petitioner of responsibility for the collection and payment of taxes such as those in question.