STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
PETER SIDOTE	:	DETERMINATION DTA NOS. 825772,
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 1, 2008 through February 28, 2010 and June 1, 2010 through May 31, 2013.	:	825899, 825964, AND 825965

Petitioner, Peter Sidote, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 2008 through February 28, 2010 and June 1, 2010 through May 31, 2013.

A hearing was held before Barbara J. Russo, Administrative Law Judge, at the offices of the Division of Tax Appeals in New York, New York, on October 2, 2014 at 10:30 A.M., with all briefs to be submitted by February 26, 2015, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Sales Tax Defense LLC (Mark L. Stone, CPA, and Jennifer Koo, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael J. Hall).

ISSUES

I. Whether Peter Sidote was a person responsible for the collection and payment of sales and use taxes on behalf of POP, Inc., d/b/a Party Time Beverages, within the meaning and intent of Tax Law §§ 1131(1) and 1133(a).

II. Whether the Division of Taxation has met its burden of proof for the assertion of fraud penalties against petitioner pursuant to Tax Law § 1145(a)(2).

III. Whether, in the alternative to fraud penalties, petitioner is liable for penalties asserted pursuant to Tax Law § 1145(a)(1).

FINDINGS OF FACT

1. P.O.P., Inc., d/b/a/ Party Time Beverage (POP) was a retail and wholesale beverage distributor located in Brentwood, New York.

2. POP leased premises from The Mayflower Property Equities Corp. (Mayflower).[1] Petitioner, Peter Sidote, was the president and principal of Mayflower.

3. Petitioner is a businessman with 20 years of experience.

4. On November 3, 2008, the Division of Taxation (Division) sent a letter to POP stating that the business's sales and use tax records had been scheduled for a field audit for the period December 1, 2005 through August 31, 2008. The letter stated that "[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date." The appointment date indicated on the letter was November 25, 2008. A records requested list was attached to the letter specifying the books and records to be provided by POP.

5. By letter dated May 27, 2010, the Division notified POP that the audit period was expanded to include the period December 1, 2005 through February 28, 2010 (the first audit). The Division again requested that the corporation produce all books and records relating to the

[1] Mayflower's name also appears in the record as The May Flowers Property Equities, Inc., and The May Flowers Property Equities Corp.

expanded audit period and included a second records request list. On January 31, 2011, the Division sent an additional request for records to POP.

6. During the course of the audit, POP did not provide all the records requested by the Division. Records provided by POP included bank statements, purchase invoices for January 2011, some exemption certificates and quick-book invoices for some nontaxable sales. POP's representative informed the Division that the business's records were seized by the Suffolk County District Attorney's office (DA's office). The Division determined that POP's sales records were inadequate because no original source documentation was provided such as register tapes, daybooks or backup to sales tax returns. The sales records did not allow the auditor the opportunity to trace any transaction back to the original source or forward to a final total. The Division's auditor also reviewed the files seized by the DA's office. The auditor determined that POP's books and records, which were seized by the DA's office, were inadequate to conduct an audit.

7. The auditor reviewed POP's bank deposits and determined that bank deposits were not in substantial agreement with its books and records. Bank deposits exceeded reported sales by approximately $2,090,952.09. The auditor requested and obtained third-party information from POP's vendors and performed a mark-up test using the cost and selling prices provided by POP. The auditor determinated a markup of 27%, which was applied to audited purchases of $7,015,457.62, resulting in audited gross sales of $8,909,631.18. The auditor reviewed register Z-out tapes (Z-tapes) obtained from the DA's office for the period May 12, 2009 through June 28, 2009. Based on the auditor's review of those Z-tapes, that auditor calculated a nontaxable

ratio of 12.77%, and applied that ratio to the entire audit period.[2] The auditor determined the resulting audited taxable sales in the amount of $7,771,871.28. Credit was given for reported taxable sales of $1,044,131.00, resulting in a determination that POP had additional taxable sales of $6,727,740.28 and tax due of $580,267.60.

8. A second audit of POP's books and records was conducted for the period March 1, 2010 through November 30, 2012. Based upon the second audit, POP entered into a consent agreement, signed by Charles Malave as president of POP, agreeing to tax in the amount of $63,502.22 plus interest for the second audit period.

9. The Division determined that petitioner and Charles Malave were responsible persons for the collection and payment of sales and use taxes on behalf of POP.

10. On August 26, 2011, the Division issued a Notice of Determination (L-036562007-8) to petitioner as an officer or responsible person of POP, asserting sales and use taxes due for the period June 1, 2008 through February 28, 2010, in the amount $284,986.83, plus penalty in the amount of $444,228.06 and interest. On August 27, 2013, the Division issued a Notice of Determination (L-040021414-2) to petitioner as an officer or responsible person of POP, asserting sales and use taxes due for the period June 1, 2010 through November 30, 2012, in the amount $118,945.22, plus penalty in the amount of $43,597.97 and interest. On October 1, 2013, the Division issued a Notice of Determination (L-040163258-7) to petitioner as an officer or responsible person of POP, asserting sales and use taxes due for the period March 1, 2013 through May 31, 2013 in the amount of $1,502.65 plus penalty in the amount of $250.22 and interest. This notice was based on a return filed by POP reporting tax due of $1,502.65 without

[2] The auditor testified that she used Z-tapes from June, July and August 2009 to calculate the nontaxable ratio, but the Division's audit report and workpapers show that Z-tapes were used from the period May 12, 2009 through June 28, 2009.

remitting payment. On October 1, 2013, the Division issued another Notice of Determination (L-040163259-6) to petitioner as an officer or responsible person of POP, asserting sales and use taxed due for the period December 1, 2012 through February 28, 2013 in the amount of $5,650.46 plus penalty in the amount of $938.97 and interest. This notice was based on a return filed by POP reporting tax due in the amount of $11,695.46 and remitting partial payment of $6,045.00. The notices of determination issued to petitioner do not state the Tax Law section upon which penalties were asserted.

11. During the course of the audit POP executed a series of consents extending the period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law. Charles Malave signed the consents as president of POP.

12. POP and Recycling in Communities, Inc., a/k/a Redem Enterprises, Inc., d/b/a CMG Marketing (Recycling), operated side by side out of the same building in Brentwood, New York. The building was owned by Mayflower. Petitioner was the president and owner of Recycling. Recycling operated a bottle and can redemption business.

13. Petitioner, POP, Recycling, Mayflower and others came under a criminal investigation and were charged by the Suffolk County DA with grand larceny, falsifying business records, and scheming to defraud. The basis of the criminal charges was a scheme conducted by petitioner and others in which they knowingly purchased previously redeemed bottles and cans and then redeemed them a second time to third parties. POP's records were seized by the DA's office in relation to the criminal investigation. Manhattan Beverage, one of POP's vendors, indicated during the first audit that POP often returned more bottles and cans than were purchased during the period at issue.

14. When redeeming the bottles and cans, petitioner received payment by cash or check, but sometimes the payment was made in merchandise such as soda or beer. The soda and beer received from distributors in exchange for the empty bottles and cans petitioner returned would go to POP. Petitioner also used POP to pass through the proceeds from the redemption scheme.

15. On June 30, 2011, petitioner entered into a plea agreement with the DA's office. As part of the agreement, petitioner signed a Settlement Agreement and Consent to Forfeiture with Order individually and on behalf of POP and Mayflower, dated October 18, 2012. Petitioner pleaded guilty to reduced charges of grand larceny in the 2nd degree, grand larceny in the 3rd degree, and scheming to defraud in the 1st degree. In exchange for entering the plea and forfeiture agreement and paying restitution, the remaining charges against petitioner, POP, Recycling and Mayflower were dismissed. In the plea agreement, petitioner admitted that, between November 1, 2002 and July 6, 2009, he engaged in a scheme wherein he knowingly purchased previously redeemed bottles and cans from Boro Recycling that had been designated for destruction and had them transported by the trailer load to his facility in Brentwood, New York. Petitioner then redeemed those already redeemed containers a second time to third-party distributors as if they were being presented for initial redemption. Petitioner obtained the deposits and handling fees to which he was not entitled for this double redemption scheme. Petitioner also admitted in the plea agreement that he created documents indicating that Boro Recycling picked up containers for recycling from "Peter Sidote's place of business known as POP, Inc., d/b/a Party Time Beverage, located in Brentwood" when no such pickup ever occurred, so that petitioner received payments for the deposits and handling charges on those fictitious containers from distributors of those products designated on the fraudulent and false invoices. Petitioner further admitted that he created false entries in the business invoices and

records of Pepsico, Canada Dry Bottling Company, Boening Brothers, and other distributors by inflating, adjusting and increasing the amount of redeemed containers he brought in to redeem at those distributors so that he received payments for more redeemed deposit containers than were actually redeemed. Petitioner admitted that he utilized POP, Recycling, and Mayflower to receive and pass through the proceeds from the double-redemption schemes and false invoice profits from distributors. Petitioner acknowledged that he entered into the plea agreement voluntarily and that he had consulted with and received effective assistance of counsel.

16. In the Settlement Agreement and Consent to Forfeiture with Order, petitioner and POP acknowledged that they had been served with a summons and complaint dated July 14, 2010, were criminal defendants under the jurisdiction of the Suffolk County Supreme Court and that they would be referred to collectively in the agreement, along with other defendants, as the "Sidote Defendants." The Sidote Defendants acknowledged that the District Attorney and petitioner entered into a plea agreement in the companion criminal actions against petitioner, POP, and other parties, and agreed to a forfeiture in the amount of $1,000,000.00 to the DA's office as restitution. Upon the execution of the settlement agreement and the receipt of the restitution, the District Attorney agreed to release accounts of the Sidote Defendants and discontinue matters against the Sidote Defendants. The Sidote Defendants acknowledged that they knowingly and voluntarily entered into the agreement after effective assistance from counsel. Petitioner signed the settlement agreement individually, on behalf of POP, Recycling, and Mayflower.

17. Petitioner signed a resale certificate on behalf of POP during the period at issue. Petitioner provided the resale certificate to Boening Brothers in order to pick up inventory for POP. The resale certificate requires the signature of an owner, partner or officer of the

corporation authorizing the purchase. Petitioner filled in POP's address as purchaser. The form lists petitioner's title as vice president. Petitioner admitted he signed the form, but states that he did not list his title.

18. Petitioner used his commercial driver's license to drive POP's truck in order to pick up inventory for POP. Petitioner would pick up inventory using POP's truck whenever POP could get a better price picking up the merchandise rather than having it delivered. Petitioner was the only person POP used to drive the truck because no one else from POP had the appropriate driver's license.

19. Petitioner underwent the tobacco sales training for POP and held the Tobacco Vendor Education Certificate for POP from 2004 through 2007. The certificate lists POP as his employer. The Suffolk County Department of Health sent a letter to POP under petitioner's name, dated August 11, 2004, stating that as operator of a tobacco vending business, petitioner was responsible for training all POP's employees involved in the sale of tobacco products. Petitioner was aware that POP needed the certificate in order to sell cigarettes.

20. Petitioner assisted with startup expenses for POP and agreed to obtain the cigarette license for POP.

21. A request for a formal hearing with the Suffolk County Department of Health regarding tobacco sales was contained within POP's files that were confiscated by the Suffolk County District Attorney's office. The request for hearing was signed by petitioner on behalf of POP, with his title listed as president. There is line through the signature and title. The record does not indicate who crossed out petitioner's name and title, or when it was crossed out.

22. The balance sheets for POP from 2006 through 2009 list petitioner as an officer. The 2008 balance sheet shows a $100,000.00 loan between Mayflower and POP, and shows expenses

paid by Mayflower for POP. The 2009 balance sheet for POP shows a $100,000.00 loan from Mayflower to POP.

23. POP purchased soda C.O.D. from Coca Cola Enterprises Bottler using an account under the name of Mayflower. Invoices from Coca Cola show that deliveries and charges for beverages were made to, and paid by, Mayflower at POP's address.

24. Invoices from Manhattan Beer Distributors to POP include a notation that no deliveries should be made from 2:00 to 3:00 P.M., and should be made to "Peter" after 11:00 A.M.

25. POP paid for petitioner's health insurance obtained through the Empire State Beer Distributors Association. There is no documentary evidence in the record that petitioner reimbursed POP for the payments.

26. A corporate credit card was issued in petitioner's name on POP's account. The form attached to the card states that it is a renewal of a corporate card previously issued to petitioner.

27. Petitioner signed a check for the payment of POP's New York State corporate taxes on December 14, 2007 from an account he maintained under the name of All Beverages, Inc.

28. Charles Malave testified that he is a responsible person for POP's sales tax obligations. Mr. Malave had the authority to sign checks and tax returns on behalf of POP. Petitioner did not sign tax returns for POP during the period at issue. A signature stamp with Mr. Malave's signature was kept at POP's premises to be used when he was not available to sign checks.

29. Mr. Malave was not present at POP full time and had another job. POP's corporate returns report that Mr. Malave devoted 50% of his time to the business. Mr. Malave had others manage POP in his absence.

30. On POP's State Liquor Authority (SLA) application, Mr. Malave stated that he would be active in the business as a full-time manager. He did not at any time inform SLA that he was only at POP part time and had other managers.

31. Mr. Malave responded "no" to a question on the SLA application that asks, "Do you or did you have a family, business or social relationship with the landlord, tenant or last licensee of the premises to be licensed?" The SLA application reports that Mayflower is the landlord and petitioner signed as landlord principal. During the hearing Mr. Malave testified that the building where POP is located is petitioner's property and that petitioner is his first cousin. Mr. Malave also testified that he purchased the business from his wife's uncle, Joe Sidote.

32. Mr. Malave did not take the tobacco sales training required by Suffolk County. Petitioner and Mr. Malave acknowledged that they would represent to inspectors that petitioner held the tobacco education certificate for POP because petitioner was present at the business more often than Mr. Malave. Mr. Malave testified that, "When the inspectors come, there always has to be someone in the building that has a license, and if Janet wasn't there and just a clerk, at least Peter would show up and say, 'I have the certificate.' This way if I couldn't been [sic] there, I wouldn't get in trouble. I also have to have a responsible person, who has a license in the building."

33. Petitioner's son, Peter Sidote, Jr., worked for POP for three years, from 2007 through 2009, as indicated on POP's payroll records.

34. POP's accountant, William Bonomo, prepared POP's payroll records. POP's accountant assisted Mr. Malave in the preparation of sales tax returns.

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, every vendor of tangible personal property or services, and corporate officers, directors 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 [1979]; ***Matter of Chevlowe v. Koerner***, 95 Misc 2d 388 [1978]; ***Matter of Unger***, Tax Appeals Tribunal, March 24, 1994, ***confirmed sub nom Matter of Landau v. Tax Appeals Tribunal,*** 214 AD2d 857 [1995], ***lv denied*** 86 NY2d 705 [1995]). Additionally, personal liability under Tax Law § 1131(1) is not limited to persons who are officers, directors or employees of the corporation (***Matter of Ianniello***,Tax Appeals Tribunal, November 25, 1992, ***confirmed*** 209 AD2d 740 [1994]). Rather, whether an individual is personally liable for tax under Tax Law § 1131(1) must be determined upon the particular facts of each case (***Matter of Cohen v. State Tax Commn.***, 128 AD2d 1022 [1987]; ***Matter of Hall*****,** Tax Appeals Tribunal, March 22, 1990**,** ***confirmed*** 176 AD2d 1006 [1991]; ***Matter of Martin****,* Tax Appeals Tribunal, July 20, 1989*,* ***confirmed*** 162 AD2d 890 [1990]; ***Matter of Autex Corp.*****,** Tax Appeals Tribunal, November 23, 1988). The pivotal question is whether the individual had or could have had sufficient authority and control over the affairs of the corporation (***Matter of Ianniello***). Factors to be considered include the individual's status as an officer, the individual's knowledge of and control over the financial affairs of the corporation, the authority to write checks on behalf of the corporation, and

the individual's economic interest in the corporation (***Matter of Ianniello***; ***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990; ***Cohen v. State Tax Commn***). As noted by the Tribunal,

> "The factual determination demands a consideration of all the surrounding circumstances and involves more than the matching of the traditional indicia of responsibility to an officer's surface acts. Indeed, a person's officer status can be offset by the circumstances, such as where the officer's actions were done under the supervision and control of persons later convicted on criminal racketeering charges . . . . Further, the lack of an official title in a corporation should not shield an individual from responsibility where that individual in fact controls the corporation" (***Matter of Ianniello***).

C. In order to prevail, petitioner bears the burden of proof to establish by clear and convincing evidence that he was not a person required to collect tax under Tax Law §§ 1131(1) and 1133(a) (***Matter of Sacher***, Tax Appeals Tribunal July 2, 2015; ***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

D. Petitioner's claim that he was not an officer or employee of POP is not supported by the record. Petitioner held himself out to third parties as an officer of POP. Specifically, petitioner signed a resale certificate as an officer of POP, authorizing purchases with the distributor Boening Brothers. Petitioner's testimony that he did not read the resale certificate he signed lacks credibility, given that he is a businessman with over 20 years of experience and the form clearly indicates which individuals are authorized to sign. The section of the resale certificate where petitioner signed clearly states: "Name of *owner, partner, or officer* of corporation authorizing purchase" (emphasis added), and petitioner filled in POP's address as purchaser. Additionally, the form specifically states, "I will incur tax liabilities, in addition to penalty and interest, for any misuse of this certificate."

Further, although petitioner argues that he was not an employee of POP, he admits that he used his commercial driver's license to drive POP's truck and pick up inventory for POP. Both petitioner and Mr. Malave admitted that only petitioner had the appropriate driver's licence to drive POP's truck.

Additionally, petitioner underwent the tobacco sales training for POP and held the Tobacco Vendor Education Certificate for POP from 2004 through 2007. Pursuant to the Suffolk County Sanitary Code, at least one principal listed on the tobacco retail dealer certificate is required to possess a valid Tobacco Vendor Education Certificate, and it is unlawful for any person to be engaged in the sale of tobacco products without first having obtained a valid Tobacco Vendor Education Certificate (Suffolk County Sanitary Code §§ 760-1111; 760-1109[B]). Petitioner's claim that he was unaware of the significance of obtaining the certificate on behalf of POP lacks credibility, given that the certificate lists POP as his employer, and that the Suffolk County Department of Health sent a letter to petitioner on behalf of POP, stating that as operator of a tobacco vending business, petitioner was responsible for training all POP's employees involved in the sale of tobacco products. Additionally, the certificate obtained by petitioner was required to be displayed at POP's place of business (Suffolk County Sanitary Code § 760-1109[C]) and petitioner knew that POP needed the certificate in order to sell cigarettes. Petitioner argues that the certificate and training he underwent on behalf of POP has no bearing because the certificate expired in August of 2007, prior to the period at issue herein. However, petitioner has not shown that his relationship with POP changed from the time he held the certificate to the period at issue. Moreover, the evidence contradicts both petitioner's and Mr. Malave's testimony that petitioner never acted as an officer or employee of POP. Petitioner also admits in his petition that he assisted with startup expenses for POP and agreed to obtain the

cigarette license for POP. Without petitioner acting on behalf of POP in obtaining a license and certificate, POP would not have been authorized to engage in the sale of tobacco products.

Also in relation to POP's tobacco sales, a request for a formal hearing with the Suffolk County Department of Health was contained within POP's files that were confiscated by the Suffolk County District Attorney's office. The request for hearing contains petitioner's signature and lists his title as president, but both the signature and title are crossed out. The record does not indicate who crossed out petitioner's name and title. While petitioner argues that because the signature and title are crossed out the document should be assumed incorrect, petitioner does not explain why he signed the form as president of POP in the first instance, and why the form was retained in POP's files. As petitioner bears the burden of proof in this matter, it was incumbent upon him to present evidence refuting the discrepancies.

Petitioner's claim that he was not an officer of POP is also contradicted by POP's balance sheets, which from 2006 through 2009, list petitioner as an officer. Additionally, the 2008 balance sheet shows a $100,000.00 loan between Mayflower, of which petitioner was president, and POP, and shows expenses paid by Mayflower for POP. The 2009 balance sheet for POP shows a $100,000.00 loan from Mayflower to POP. Additionally, contrary to the assertion by petitioner's witness, Mr. Bonomo, that Mayflower was merely POP's landlord, invoices from Coca Cola Enterprises Bottler show that deliveries and charges for beverages were made to, and paid by, Mayflower.

E. Even were it determined that petitioner was not an officer or employee, he could still be found liable for the sales and use taxes assessed against POP. In ***Matter of Ianniello***, petitioners, who were neither officers, directors nor employees of the company against which tax

was assessed, were determined to be personally liable. Quoting the determination of the Administrative Law Judge, the Tribunal noted:

> "Paul and Pauline Gelb functioned as 'fronts' for petitioners Cohen and Ianniello as part of their scheme to skim money. That petitioners had a substantial economic interest in, and substantial control over, the finances of P & G Funding is evidenced by the fact that they received $2,000,000.00 of unreported sales income over a four-year period. Certainly the definition of 'persons required to collect tax' in Tax Law § 1131(1) does not act as a shield to protect petitioners from sales tax liability simply because they devised a scheme to conceal their involvement with P & G Funding. As argued by the Division's counsel, petitioners acted as de facto officers or directors [footnote omitted]" (***Matter of Ianniello*** [emphasis added]).

It is clear that Tax Law § 1131(1) does not bear an exclusive list of those persons who may be held liable for the collection of tax. Similar to the petitioners in ***Matter of Ianniello***, petitioner here possessed the indicia of control to make him personally liable for the collection of tax. Petitioner's argument that he had no control over POP is contradicted by the admissions he made in the plea agreement. Petitioner signed a plea agreement and entered into a settlement agreement and consent to forfeiture both individually and on behalf of POP with the Suffolk County District Attorney's office wherein he admitted that POP was his place of business and that he utilized POP, Recycling and Mayflower to receive and pass through the proceeds from the double-redemption schemes and false invoice profits. Significantly, petitioner signed the settlement agreement and consent to forfeiture on behalf of POP. Petitioner's substantial economic interest in, and substantial control over, the finances of POP is evidenced by his admissions in the plea agreement that he utilized POP to receive and pass through the proceeds from the redemption scheme. Petitioner is precluded from denying the facts to which he admitted in the plea agreement.

Petitioner's claim that he felt pressured into signing the forfeiture agreement on behalf of POP and that he did not know why POP was included in the investigation lacks credibility. Petitioner was represented and advised by counsel during the criminal proceedings and when he entered into the plea agreement and consent to forfeiture. He specifically acknowledged that he had ample opportunity to discuss the agreement with counsel, was fully apprised by counsel of his rights, and knowingly and voluntarily entered into the agreement after effective assistance from counsel.

Moreover, commingling of income between Recycling and POP further evidences petitioner's control over POP's financial affairs. Specifically, petitioner testified that proceeds received from distributors by way of merchandise (soda or beer) for empty bottles and cans petitioner received from the public would go to POP. This admission shows the interconnection between Recycling and POP, whereby Recycling obtained the empty cans and bottles from the public, and POP received the proceeds for those empties by way of soda and beer when the empties were returned to a distributor. Such merchandise became items of POP's inventory. When the soda and beer were sold, sales tax was required to be collected and remitted. By giving POP the proceeds from the returns, petitioner was in effect purchasing POP's inventory for later resale.

F. Petitioner gained a unique economic benefit from the operation of POP. As discussed above, petitioner utilized POP to receive and pass through the proceeds of his illegal activities. Additionally, POP paid for petitioner's health insurance obtained through the Empire State Beer Distributors Association. Although petitioner argues that he reimbursed POP for these payments, he failed to present any documentary evidence to support his claim for reimbursements. A corporate credit card was also issued in petitioner's name on POP's account. While petitioner

argues that the copy of the credit card contained in the record was never activated or used, and contends that it was issued by mistake, a review of the card reveals that it is a renewal of a corporate card previously issued to petitioner.

G. Petitioner denies writing checks for POP. However, the record shows that petitioner made a payment for POP's corporate taxes. Specifically, petitioner signed a check for the payment of POP's New York State corporate taxes on December 14, 2007 from the account of All Beverages, Inc. Petitioner's argument that he made this payment as a favor to Mr. Malave is belied by the evidence in the record showing a commingling of assets and proceeds between POP, Recycling, Mayflower, and petitioner.

H. Petitioner's argument that Charles Malave is responsible for the payment of POP's sales and use taxes does not excuse petitioner from responsibility. Although Mr. Malave testified that he is a responsible person for POP, this does not preclude petitioner from being determined to be a responsible person for POP as well. It is well settled that liability with respect to sales tax is joint and several (***see Matter of Sacher***; ***Matter of Tafeen***, Tax Appeals Tribunal, January 3, 2002; ***Matter of Phillips***, Tax Appeals Tribunal, May 11, 1995; Tax Law § 1133[a]). Moreover, Mr. Malave's testimony that only he, and not petitioner, was responsible for POP is contradicted by the evidence in the record.

The record indicates that Mr. Malave's testimony lacks credibility. The determination of whether testimony is credible rests with the trier of facts, "who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony" (***Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992). A determination of testimonial credibility rests on the twin components of "competency," which is the "[o]pportunity and capacity to perceive combined with capacity to recollect and communicate," and "veracity," which is the

"truthfulness of the witness" (***Matter of Impath***, Tax Appeals Tribunal, January 8, 2004). As noted by the Tribunal,

> "Any additional evidence relied on in support of specific testimony given, referenced to refresh the recall of a witness, or otherwise augmenting the testimony given concerning a claim of event, date, time and place, can itself offer insight as to whether the witness's recall is credible and correct . . . . So too, careful and objective review of such evidence and of any accompanying testimony or other evidence may reveal significant inconsistencies weighing against the likelihood that the testimony, thought honestly given, might through the fallibility of human memory, simply be incorrect or not clear and convincing evidence. It is against this background that the evidence in this case, including the testimonial evidence, must be evaluated" (***Matter of Robertson***, Tax Appeals Tribunal, September 23, 2010).

A review of Mr. Malave's testimony in light of the other evidence in the record reveals a lack of credibility. First, a number of inconsistencies are noted between Mr. Malave's testimony and the statements he made on the State Liquor Authority application. Mr. Malave stated "no" in response to a question on the application that asks, "Do you or did you have a family, business or social relationship with the landlord, tenant or last licensee of the premises to be licensed?" The application further shows that Mayflower is the landlord and petitioner signed as landlord principal. During the hearing Mr. Malave testified that the building where POP is located is petitioner's property and that petitioner is his first cousin. Additionally, in contradiction to his statement on the application that he did not have a family or social relationship with the last licensee, Mr. Malave testified that he purchased the business from his wife's uncle, Joe Sidote.

Mr. Malave further stated on the SLA application that he would be active in the business as a full-time manager. Yet, on POP's corporate returns, Mr. Malave states that he only devotes 50% of his time to the business. Further, during the hearing, Mr. Malave testified that he was not at the store full time and had another job. It is telling that despite Mr. Malave's claim that he had sole responsibility for POP, in response to questions regarding the operation of the store, such as

why petitioner was issuing a resale certificate for POP and why the District Attorney seized POP's records, Mr. Malave's responses were "I don't know" and "I was not there." Likewise, in response to the question of whether he was aware of the double redemption and false invoice scheme to which petitioner pleaded guilty both individually and on behalf of POP, Mr. Malave claimed, "Not a scheme. I didn't know anything. Like I said, I had another job. I came into this late after everything was done."

Additionally, although Mr. Malave claims to be the only individual responsible for POP, he did not take the required tobacco sales training. Instead, petitioner took the training for POP. Both petitioner and Mr. Malave acknowledged that they would represent to inspectors that petitioner held the tobacco education certificate for POP because petitioner was present at the business more often than Mr. Malave. Indeed, Mr. Malave testified that, "When the inspectors come, there always has to be someone in the building that has a license, and if Janet wasn't there and just a clerk, at least Peter would show up and say, 'I have the certificate.' This way if I couldn't been [sic] there, I wouldn't get in trouble. I also have to have a responsible person who has a license in the building."

Mr. Malave also testified that no one named Peter ever worked for POP and claimed that petitioner's son, Peter Sidote, Jr., was never on POP's payroll. Contrary to Mr. Malave's testimony, Mr. Bonomo testified that petitioner's son did in fact work for POP. Mr. Bonomo, who testified that he prepared POP's payroll, claimed that petitioner's son worked for POP "for a short period of time, maybe - - I don't know if it was six months or a year." In contradiction to both Mr. Malave's testimony that petitioner's son was never on POP's payroll and Mr. Bonomo's testimony that he only worked there for a short time, a review of POP's payroll journal shows that Peter Sidote, Jr., in fact worked for POP for three years, from 2007 through

2009. The inconsistencies evidence that the testimony of both Mr. Malave and Mr. Bonomo is not credible.

I. Petitioner has failed to establish by clear and convincing evidence that he was not an officer or employee of POP and that he lacked the authority to control the finances, including payment of sales tax obligations, for POP. Additionally, petitioner has not shown that he was thwarted by others in carrying out his corporate duties through no fault of his own (***Matter of Goodfriend***). Upon review of the entire record, it becomes clear that petitioner has not met his burden of proof and was properly held liable for the sales tax obligations of POP for the periods at issue.

J. The Division argues for the imposition of a fraud penalty upon petitioner pursuant to Tax Law § 1145(a)(2) for the period June 1, 2008 through February 28, 2010, or in the alternative the imposition of a negligence penalty pursuant to Tax Law § 1145(a)(1).

Fraud is not defined in the Tax Law. However, case law has held that a finding of fraud requires the Division to show "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (***see Matter of Sona Appliances***, Tax Appeals Tribunal, March 16, 2000). In order to establish fraudulent intent, petitioner must have acted deliberately, knowingly and with the specific intent to violate the Tax Law (***see Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1988).

The burden rests with the Division to prove by clear and convincing evidence that petitioner, with willful intent, was in violation of the tax laws (***see Matter of Sona Appliances; Matter of Cardinal Motors***, State Tax Commn., July 8, 1983, ***confirmed Matter of Cardinale v.***

Chu, 111 AD2d 458 [1985]). Fraud must be established with affirmative evidence and may not be presumed (***see Matter of Jay's Distributors, Inc.***, Tax Appeals Tribunal, April 15, 2015, ***citing Intersimone v. Commissioner***, TC Memo 1987-290, 53 TCM 1073 [1987]). Therefore, mere suspicion of fraud from the surrounding circumstances is not enough (***see Goldberg v. Commissioner***, 239 F2d 316 [5th Cir 1956]; ***Matter of What a Difference Cleaning***, Tax Appeals Tribunal, May 15, 2008).

It is first noted that the notices of determination do not specifically reference Tax Law § 1145(a)(2) and the Division does not affirmatively state the imposition of fraud penalties in its answers. In the preliminary statement of the Division's brief, it states that the "first audit" for the period of June 1, 2008 through February 28, 2010 assessed penalty for fraud. The auditor testified that fraud penalty was assessed because the purchases that were obtained from third parties exceeded the amount reported on the federal returns. When asked whether that was true for the entire audit period, the auditor responded, "For most - - we were unsure. The last year was not as aggressive. The last year for the audit was in line, it wasn't exceeded."

Assuming that, despite failing to affirmatively raise fraud penalties in the Division's answer, petitioner was given sufficient notice of the fraud penalty based on the amount asserted in the notice and the testimony at hearing, it is determined that the Division has failed to meet its burden of establishing the "clear, definite and unmistakable" evidentiary standard necessary to sustain a fraud penalty (***see Matter of Sona Appliances***). The Division has not established that POP's underreporting, and petitioner's as a responsible person for POP, was willful, knowledgeable and intentional. The Division argues as a basis for its assertion of the fraud penalty that POP underreported its sales tax for the period covered by the first audit by over 25%. While substantial underreporting of taxes owed is strong evidence of fraud (***Matter of Cousins***

Service Station, Tax Appeals Tribunal, August 11, 1988), substantial underreporting alone is not enough to establish fraud (***Matter of Yel-Bom's Service Center, Inc.***, Tax Appeals Tribunal, May 10, 1990).

The Division's calculation of a nontaxable ratio was obtained from an estimate based on two months of Z-tapes, from May 12, 2009 through June 28, 2009. From those two months the Division calculated a nontaxable ratio of 12.77%, which it applied to the entire audit period. The Tribunal recently held that a similar estimate based on a test period projection was a "shortcoming" for purposes of meeting the Division's burden of proof for fraud penalties (***Matter of Jay's Distributors, Inc.***). The Tribunal noted that,

> "our decision herein thus finds the same evidence sufficient to sustain an assessment on tax in the first instance, but insufficient to affirmatively prove the same assessment in the fraud penalty context. We note further that this is not an inconsistency, but simply a shifting of the burden of proof" (***Matter of Jay's Distributors, Inc., citing Matter of Cousins Service Station***).

The Division further argues that petitioner's lack of cooperation during the audit and course of conduct are indicia of fraud. However, the record does not reveal that either POP's or petitioner's level of cooperation or lack thereof rises to the level of fraud. POP made what records it had available to the Division, including bank statements, some purchase invoices, some nontaxable sales invoices, some exemption and resale certificates, and informed the auditor that the DA had its records. Such conduct does not support a finding of fraud (***see Matter of Yel-Bom's Service Center, Inc.***).

Finally, the Division asserts that petitioner's "course of conduct," without elaboration, is indicia of fraud. Although petitioner admitted to criminal conduct in his plea agreement, the conduct admitted to did not rise to the level of criminal tax evasion. While petitioner admitted that he used POP to receive and pass through proceeds from his illegal redemption scheme, the

plea makes no mention of willful and deliberate underpayment of taxes. Lacking any clear and definite evidence of fraud in relation to nonpayment or underpayment of taxes, the record does not support the imposition of a penalty for fraud. As such, the fraud penalty is cancelled.

K. The Division asserts in its post-hearing brief that an alternative penalty for negligence should be imposed pursuant to Tax Law § 1485(a)(1) if the finding of fraud is not sustained. In ***Matter of Ilter Sener***, the Tribunal allowed the Division to seek the lesser penalty as an alternative to fraud and shifted the burden of proving willful neglect to the Division (***Matter of Ilter Sener***, Tax Appeals Tribunal, May 5, 1988). In that case, notice in the Division's answer of the alternative penalty was deemed adequate to allow the taxpayer an opportunity to prepare a response to the possibility of a late-payment penalty in addition to the fraud penalty (***Id.***).

Here, the Division did not specifically assert a negligence penalty in the alternative to fraud in its answer. The difficulty the Division has is that nowhere in the notices or answer does it specifically state what penalties it is asserting. The Division's answer for the period June 1, 2008 through February 28, 2010 simply states the amount of penalty as was asserted in the notice, and states that "reasonable cause has not been shown for abatement of penalty." This falls far short of the notice of the alternative penalty that the Tribunal deemed adequate in ***Matter of Sener***. Here, the record shows no attempt by the Division to assert the lesser penalty until its post-hearing brief. While the Division cites to its hearing memorandum, it is noted that this document was not introduced at the hearing and not made a part of the record herein.[3]

[3] Assuming, arguendo, that even though not a part of the record herein, the Division's hearing memorandum could be considered to give petitioner notice of the Division's assertion of an alternative penalty, by not subsequently raising the issue at hearing, it is deemed abandoned. Because the Division bears the burden of proof for imposing the alternative penalty (***see Matter of Sener***) it was imperative for the Division to raise the issue.

The Division also contends that it asserted the alternative penalty at the hearing. However, a review of the hearing transcript reveals that the alternative penalty was not raised during the hearing. Specifically, when asked during the hearing to state the issues, other than discussing the issue of whether petitioner was a responsible person for POP, the Division stated:

> "There is also an additional - - I'm not sure if this is really an issue as far as the penalties go, because I believe that petitioner is only disputing that they are a responsible person, so I'm not sure that the penalties are coming into play here. There are fraud penalties on the first liability for the first audits that were assessed. That could be at issue. I'm not sure. It depends on how petitioner wants to put in his case" (Transcript p. 9).

The only other time during the hearing when penalties were raised was during the auditor's testimony where, as noted above, the auditor testified that the fraud penalty was asserted because the purchases that were obtained from third parties exceeded the amount reported on the federal returns. At no time during the hearing did the Division assert the alternative penalty. The Division did not assert the alternative penalty until its post-hearing brief.

The Tribunal stated in ***Matter of Anton's Car Care Center***, "the first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence but not charged" (***Matter of Anton's Car Care Center***, Tax Appeals Tribunal, November 23, 1988, ***quoting Matter of Murray v. Murphy***, 24 NY2d 150 [1969]). The Tribunal held that the Division's failure to request the alternative penalty until the end of the hearing deprived the petitioners of the opportunity to prepare a response to the lesser penalty and that prejudice in such a case was presumed, and the alternative penalty was denied (***Id.***; ***see also Matter of Yel-Bom's Service Center, Inc.***).

It is determined that petitioner here was prejudiced because the Division failed to raise the alternative penalty in its answer or at the hearing (***see id.***) and the imposition of the lesser penalty for the period June 1, 2008 through February 28, 2010 is accordingly denied.

L. With regard to the audit period covered by the second audit (June 1, 2010 through May 31, 2013), the penalties assessed were not based on fraud in the first instance. As such, petitioner bears the burden of proof to show reasonable cause as well as the absence of willful neglect for the abatement of these penalties (***see Matter of T.V. Data, Inc.***, Tax Appeals Tribunal, March 2, 1989). Petitioner did not address these penalties and as such has failed to meet his burden of showing that the underpayment of tax was due to reasonable cause and not willful neglect.

M. The petition of Peter Sidote is granted to the extent indicated in Conclusions of Law J and K but is otherwise denied; fraud penalty pursuant to Tax Law § 1145(a)(2) is canceled and the lesser alternative penalty pursuant to Tax Law § 1145(a)(1) is denied for the period June 1, 2008 through February 28, 2010, and the notices of determination, dated August 26, 2011, August 27, 2013, and October 1, 2013, as modified above, are sustained.

DATED: Albany, New York
August 13, 2015

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE