

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GREGG M. REUBEN : DETERMINATION
for Revision of Determinations or for Refund of : DTA NO. 827340
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Periods June 1, 2012 through :
August 31, 2012 and June 1, 2013 through :
February 28, 2015. :

Petitioner, Gregg M. Reuben, 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 periods June 1, 2012 through August 31, 2012 and June 1, 2013 through February 28, 2015.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on April 26, 2017 at 10:30 A.M., with all briefs to be submitted by August 21, 2017, which date began the six-month period for the issuance of this determination. Petitioner appeared by Ballon, Stoll, Bader & Nadler, PC (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jessica DiFiore, Esq., and David Gannon, Esq., of counsel).

ISSUES

I. Whether petitioner was properly determined to be a person under a duty to collect and remit sales and use taxes, pursuant to Tax Law § § 1131 (1) and 1133 (a), on behalf of 12 limited liability companies.

II. Whether, if so, petitioner has nonetheless established facts and circumstances sufficient to negate his liability for failing to have collected and remitted taxes, or to warrant reduction or abatement of penalties.

FINDINGS OF FACT

1. In January 2007, petitioner, Gregg M. Reuben, established Alliance Parking Services, LLC (Alliance). During the periods at issue herein, petitioner, via Alliance, was engaged in the business of operating 25 to 30 parking lots and parking garages in the New York City metropolitan area through, as relevant here, the following 12 different limited liability companies (the 12 LLCs):

Saint Nicholas Parking Mgmt, LLC.
Atlantic Parking Mgmt, LLC.
150th Parking Leasehold, LLC.
Element Parking Mgmt, LLC.
Grosvenor Parking, LLC.
162 Parking Leasehold, LLC.
Key Parking Mgmt, LLC.
Schermerhorn Parking Mgmt, LLC.
Corinthian Parking Management, LLC.
Alliance E. 69th Parking, LLC.
Alliance Impala Parking, LLC.
222 Riverside Management, LLC.

2. Alliance was the sole member of each of the foregoing 12 LLCs. Petitioner, in turn, owned 99% of Alliance. Another entity, Gregg M. Reuben, Inc., owned the remaining 1% of Alliance. Gregg M. Reuben, Inc., was an S corporation, and petitioner was the sole shareholder of Gregg M. Reuben, Inc.

3. For 25 years prior to establishing Alliance, petitioner had been employed by large and mid-sized companies that were engaged in the business of operating parking lots and parking garages. Petitioner stated that he clearly understood how the parking facilities needed to be

managed, including setting up the operating controls, the appropriate levels of staffing, pricing strategies, marketing and, and all of the facility level operational matters.

4. Alliance began operations in January 2007, managing one parking facility. By the end of 2007, Alliance had grown to operating over 10 parking facilities. By the end of 2008, Alliance operated 20 such facilities. As of 2010, Alliance operated over 30 parking facilities, had over 100 employees, and operating revenues in excess of ten million dollars.

5. As Alliance grew, petitioner hired administrative staff to perform accounting services, including accounts payable and accounts receivable functions. In 2009, petitioner hired Kwesi Bovell, as comptroller and chief financial office (CFO). Mr. Bovell was tasked by petitioner with developing accounting systems for Alliance. Mr. Bovell's duties also included paying vendors and managing the payroll. During its early years, Alliance had utilized a payroll service (ADT). However, in or about 2013, payroll processing was changed so as to be handled in-house, at the request and under the direction of Mr. Bovell. Petitioner stated that he was "concerned" about this move, but that he agreed to Mr. Bovell's request.

6. An outside accounting firm was retained to prepare annual financial statements and income tax returns for Alliance and the 12 LLCs, and in connection therewith to provide a review, but not an audit level examination, of Alliance's business. While income tax preparation and filing matters were handled by the accounting firm, sales tax accounting, reporting and payment functions were kept in-house, under the direction of Mr. Bovell.

7. Petitioner stated that Mr. Bovell was directly in charge of preparing and filing the sales tax returns, and paying the tax due thereon. Petitioner was the sole authorized signatory on the bank accounts of Alliance and the 12 LLCs. However, Mr. Bovell was authorized to use

petitioner's electronic signature, and did so for sales tax filings and payments, as well as for other payments. Petitioner admitted to signing sales tax returns for certain periods, specifically after Mr. Bovell's employment with Alliance had been terminated (*see* Finding of Fact 10).

8. Petitioner relied upon Mr. Bovell to handle financial matters for Alliance. In contrast, petitioner was fully engaged in operational matters, including "growing the business," by obtaining new operating locations, and "engaging in strategic partnerships." Petitioner did not open or review bank statements, and testified that "I never looked at the mail unless somebody specifically brought it to my attention." Petitioner further stated, with regard to tax and other financial matters, that:

"So far as I was concerned, the I's were being dotted, the T's were being crossed. The landlords were getting paid, our employees were paid, our vendors were getting paid, and that was my litmus test;I knew if there were problems, I would get calls from landlords or from our clients with whom we need to make remittances to, or vendors. Because those are all people I had relationships with."

9. Near the end of December 2013, petitioner began to receive calls from parking facility landlords advising that rent payments had not been made. In response, petitioner testified that he began opening and reviewing bank statements, and he spoke to Mr. Bovell about the financial situation of Alliance and the 12 LLCs. He stated that Mr. Bovell advised him that "cash was very tight . . . and he was having trouble making those payments." Petitioner told Mr. Bovell it was his responsibility to report the financial condition of the companies to petitioner, and that "if the company needed money, that was [petitioner's] responsibility."

10. In April 2014, after determining that there were serious problems with Alliance's business, and being unsatisfied with Mr. Bovell's attempts to explain the reasons for the problems, petitioner discharged Mr. Bovell. After discovering sales tax filing and payment

issues with regard to the 12 LLCs, petitioner filed returns on behalf of those entities, though he did not have the financial means to make all of the payments due thereon.

11. Petitioner continued his own attempts to discern the reasons for the financial difficulties facing Alliance. Ultimately, however, Alliance and petitioner did not have the financial means to remain in business, and in late 2014, Alliance ceased its business operations.

12. Petitioner hired an accounting firm, WeiserMazars, LLP, to perform a forensic accounting of Alliance’s business. In a letter dated July 27, 2015, WeiserMazars stated that:

“It is our understanding that during a period of about one and a half (1½) years, [Mr. Bovell] prepared sales and use tax returns and issued tax-payment checks for the [12 LLCs]. Unbeknownst to [petitioner], . . . many of those returns and/or payments were never remitted and the funds for the taxes are missing.”

13. Petitioner did not have the funds to continue the forensic accounting process to completion, and the engagement with WeiserMazars was terminated.

14. The Division of Taxation (Division) issued to petitioner a total of 44 notices of determination, assessing sales and use taxes due, in the amounts and for the specified sales tax quarterly periods identified below, plus interest and penalty, as follows:

<u>Entity</u>	<u>Notice Number</u>	<u>Notice Date</u>	<u>Period Ended</u>	<u>Amount¹</u>
St. Nicholas Parking Mgmt., LLC	L-042442539	01/30/15	02/28/14	\$23,528.44
	L-042442540	01/30/15	11/30/13	\$1,082.65
	L-042442541	01/30/15	08/31/13	\$1,002.38
	L-042442542	01/30/15	08/31/12	\$2,679.88

¹ The amounts shown do not reflect amounts of penalty and/or interest that are also assessed, or any payments or credits made or applied against the listed assessments.

Atlantic Parking Mgmt., LLC	L-042563525	03/10/15	08/31/14	\$11,285.51
	L-042563526	03/10/15	05/31/14	\$10,337.44
	L-042563527	03/10/15	02/28/14	\$8,638.54
	L-042563528	03/10/15	11/30/13	\$828.96
	L-042563529	03/10/15	08/31/13	\$869.43
	L-042892004	06/19/15	11/30/14	\$11,285.51
150th Parking Leasehold, LLC	L-042551728	03/03/15	08/31/14	\$9,614.97
	L-042551729	03/03/15	05/31/14	\$8,472.74
	L-042551730	03/03/15	02/28/14	\$8,796.39
	L-042551731	03/03/15	11/30/13	\$771.90
	L-042551732	03/03/15	08/31/13	\$714.65
Element Parking Mgmt., LLC	L-042519700	02/20/15	08/31/13	\$572.82
	L-042519701	02/20/15	05/31/14	\$11,051.88
	L-042519702	02/20/15	02/28/14	\$10,953.80
Grosvenor Parking LLC	L-042370290	01/14/15	08/31/14	\$136.14
	L-042370291	01/14/15	08/31/13	\$400.79
	L-042370292	01/14/15	05/31/14	\$2,551.01
	L-042370293	01/14/15	02/28/14	\$467.50
	L-042370294	01/14/15	11/30/13	\$432.85
162 Parking Mgmt., LLC	L-042519805	02/20/15	08/31/14	\$21,177.53
	L-042519806	02/20/15	05/31/14	\$20,609.34
Key Parking Mgmt., LLC	L-043493083	08/17/15	05/31/14	\$1,998.83
	L-043493084	08/17/15	02/28/14	\$2,569.62
	L-043493085	08/17/15	11/30/13	\$3,950.87
Schermerhorn Parking Mgmt., LLC	L-043171571	06/17/15	05/31/14	\$4,147.20
	L-043171572	06/17/15	02/28/14	\$4,725.40
Corinthian Parking Mgmt., LLC	L-043202067	06/19/15	11/30/14	\$36,369.03
	L-043202068	06/19/15	08/31/14	\$200.00
	L-043202069	06/19/15	08/31/13	\$1,996.20
	L-043202070	06/19/15	05/31/14	\$30,542.85
Alliance E 69th Parking, LLC	L-042258454	03/16/15	08/31/13	\$884.86
	L-042258455	03/16/15	02/28/14	\$1,510.15
	L-042258456	03/16/15	11/30/13	\$955.81

Alliance Impala Parking, LLC	L-042519748	02/20/15	08/31/14	\$11,133.96
	L-042519749	02/20/15	05/31/14	\$8,976.30
	L-042519750	02/20/15	02/28/14	\$10,724.81
	L-042519751	02/20/15	11/30/13	\$800.36
	L-042519752	02/20/15	08/31/13	\$1,997.26
222 Riverside Management, LLC	L-043421831	07/28/15	02/28/15	\$9,382.34
	L-043421832	07/28/15	11/30/14	\$9,382.34

15. Each of the foregoing notices indicates that petitioner was being held liable as an officer or person under a duty to collect and remit sales and use taxes on behalf of the various entities identified on the notices, and who failed to do so by either a) failing to file sales tax returns; b) filing sales tax returns late and failing to remit the taxes due thereon; and/or c) filing sales tax returns with respect to which additional tax was due but was not remitted. Petitioner does not challenge the dollar amounts of tax assessed, or the methodology by which such amounts were determined. Instead, he disputes only the Division's claim that he was an officer or person under a duty to collect and remit taxes on behalf of the named entities, and maintains that even if he was under a duty, he should be excused from liability because he was thwarted in carrying out his obligations to collect and remit by the actions of Mr. Bovell.

16. Petitioner retained an attorney who conducted his own examination into the operations of Alliance, including specifically Mr. Bovell's role therein. Testimony at hearing, and allegations set forth in a complaint filed in a civil action brought on behalf of petitioner and Alliance against Mr. Bovell, on April 17, 2017, in New York County Supreme Court (Index No. 652049/2017), essentially set forth a scenario where Mr. Bovell diverted or siphoned money from Alliance to himself. The methods described and allegedly employed by Mr. Bovell included:

- a) opening multiple bank accounts, unbeknownst to petitioner, in Alliance's name, or in the name of other entities, to which merchant services accounts (essentially credit card payment terminals located at various parking facilities) were linked, such that customers' credit card payments for parking were deposited to the linked bank accounts and thus diverted to Mr. Bovell;
- b) setting up false accounts, including hiring fictitious employees, such that the number of employees was inflated and by which wages and other payments to such phantom employees could be diverted to Mr. Bovell; and
- c) preparing tax returns, including sales and use tax returns, but not filing and/or remitting the amounts due thereon.

17. None of the financial statements or reports prepared by the outside accounting firm hired by Alliance (*see* Finding of Fact 6) have been offered into evidence in this matter. In addition, the civil complaint filed against Mr. Bovell (*see* Finding of Fact 16) had not been answered as of the date of the hearing held herein, and none of the documentation allegedly supporting the causes of action listed in the complaint has been included in the record in this matter. Further, there is no claim or evidence that law enforcement has been contacted to pursue criminal prosecution against Mr. Bovell.

CONCLUSIONS OF LAW

A. Tax Law § 1133 (a) provides that “every person required to collect any tax imposed by this article [article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article.”

B. Tax Law § 1131 (1) defines a “person required to collect any tax imposed by this article” to include:

“any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual

proprietorship in complying with any requirement of this article; *and any member of a partnership or limited liability company*” (emphasis added).

C. As above, Tax Law § 1131 (1) clearly states that any member of a limited liability company is a “person required to collect any tax imposed by this article” and, as provided in Tax Law § 1133 (a), a member of a limited liability company “shall be personally liable for the tax imposed, collected or required to be collected under this article.” The Tax Law contains no factors to qualify or limit the liability imposed upon members of limited liability companies. In *Matter of Santo* (Tax Appeals Tribunal, December 23, 2009), the Tribunal stated:

“Petitioner was a member of a limited liability company and, as with members of a partnership, such members are subject to per se liability for the taxes due from the limited liability company. . . . Since Tax Law § 1131(1) imposes strict liability upon members of a partnership or limited liability company, all that is required to be shown by the Division for liability to obtain is the person’s status as a member.”

D. Petitioner was a member of Alliance, an LLC. He owned 99% of that entity individually, and owned the remaining 1% of that entity as the sole shareholder of Gregg M. Reuben, Inc., an S corporation that was the only other member of Alliance (*see* Finding of Fact 2). Alliance, in turn, was the sole member of each of the 12 LLCs. By virtue of his status as a member of Alliance, an LLC that was, in turn, the sole member of each of the 12 LLCs, petitioner was properly subject to assessment, and was per se personally liable, pursuant to Tax Law §§ 1133 (a) and 1131 (1), for the sales and use taxes due herein. (*see Matter of Santo; see also Matter of Eugene Boissiere and Jason Krystal*, Tax Appeals Tribunal, July 28, 2015; *Matter of Franklin*, Tax Appeals Tribunal, May 14, 2015).²

² Recognizing that the statutory scheme, with its imposition of strict, per se, liability “can result in harsh consequences for certain partners and members who have no involvement in or control of the business’s affairs,” the Division issued TSB-M-11 (17) S to provide some relief to certain limited partners and certain LLC members. The Division’s policy eliminates the collection of penalties from the eligible individual, and reduces liability relative to the percentage of profits or losses received by the eligible individual. In order for an LLC member to qualify for such relief, that member must demonstrate that:

E. Given the foregoing, it is not necessary, for purposes of determining petitioner's liability for the taxes in question, to further inquire into the particulars of petitioner's involvement in the business of Alliance, or of the 12 LLCs. In fact, petitioner did not address or refute the Division's position that he was, and is, per se liable for the taxes at issue. However, such inquiry is relevant and necessary in order to address the question of abatement of the penalties assessed against petitioner, inasmuch as the same may be reduced or eliminated upon a showing of reasonable cause sufficient to overcome their imposition (*see* Tax Law § 1145 [e]).³

F. Petitioner's primary contention is that Mr. Bovell, rather than he, should be held as the responsible person under a "duty to act." In this vein, petitioner argues that the obligation to file returns and pay taxes on behalf of Alliance and the 12 LLCs, as required, was delegated to Mr. Bovell, whose acceptance of those obligations rendered him a responsible person under a duty to act. In turn, petitioner argues that the affirmatively deceitful actions allegedly engaged in by Mr. Bovell left petitioner unable to learn that required returns were not being filed, and taxes due

(1) the member owns less than a 50% interest in the LLC; and

(2) the member was not under a duty to act for the LLC in complying with the Tax Law.

In light of petitioner's ownership interest as a member of Alliance, and of Alliance's ownership interest as the sole member of each of the 12 LLCs, as well as petitioner's position of responsibility and duty to act with regard to the business, he is not eligible for the relief afforded under TSB-M-11 (17) S.

³As described, petitioner was one of two members of Alliance, which was, in turn, the sole member of each of the 12 LLCs whose sales and use tax liabilities have been assessed against petitioner as a person under a duty to collect and remit, per Tax Law §§ 1131 (1) and 1133 (a). In fact, petitioner owned 100% of Alliance, as an individual member holding a 99% interest therein, coupled with his status as the sole shareholder of the S corporation member that held the remaining 1% interest in Alliance (*see* Conclusion of Law D). Assuming, *arguendo*, that the intervening ownership of the 12 LLCs by Alliance, itself an LLC, precludes the imposition of strict, per se liability against petitioner, on the basis that he was not directly a member of any of the 12 LLCs, he nevertheless remains subject to the liabilities in question as a person under a duty to collect and remit via his ownership and management of Alliance (and, in turn, of the 12 LLCs), as described fully hereinafter (*see* Conclusions of Law F through L).

were not being paid, and suffices as reasonable cause sufficient to excuse petitioner from any duty he was under.

G. As to petitioner's first argument, and notwithstanding that Mr. Bovell, in addition to petitioner, appears to have been under a duty to act, it is well settled that Tax Law § 1133 (a) creates joint and several liability for unpaid sales and use taxes, including penalties imposed in connection therewith (*see Matter of Milne*, Tax Appeals Tribunal, February 17, 2005; *Matter of Wendel*, Tax Appeals Tribunal, February 3, 2000). Moreover, petitioner's argument that even if he was under a duty to act, his failure to have done so resulted from the actions of Mr. Bovell, and should be excused, is unavailing under the facts of this case.

H. The factors relevant in reaching a determination as to whether an individual is a person under a duty to act in assuring the collection and remittance of sales and use taxes under Tax Law articles 28 and 29 include, but are not limited to, the authority to sign checks, responsibility for managing the entity and maintaining its books, and the ability to hire and fire employees (*see Ippolito v Commissioner of New York State Dept of Taxation and Fin.*, 116 AD 3d 1176 [3d Dept 2014]). These factors are well established:

“Whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [1987]). We look to various factors in making this factual determination. The holding of corporate office is one such factor, but is not determinative (*see Chevlowe v Koerner*, 95 Misc 2d 388 [1978]). “Generally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act” (20 NYCRR 526.11 [b] [2]). Other relevant factors include authority to hire and fire employees, authority to sign corporate checks and status as a stockholder (*see, e.g., Matter of Ippolito v Commissioner of N.Y. Dept. of Taxation and Fin.*, 116 AD3d 1176 [2014]; *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990). ‘What must be considered is petitioner's authority and responsibility to exercise control over the corporation, not his actual assertion of such authority (citations omitted)’

(Matter of Coppola v Tax Appeals Trib. of State of N.Y., 37 AD3d 901 [2007])
(Matter of Kieran, Tax Appeals Tribunal, November 13, 2014).

I. The facts here reveal that petitioner not only owned Alliance, which in turn owned each of the 12 LLCs, but that he created and built the business of Alliance through such LLCs. At all times, petitioner played a significant, active and ongoing role in the business. His authority included the hiring and firing of employees, and the hiring or engagement of outside vendors of goods and services, including retention of an accounting firm. He filed the certificates of authority for each of the six LLCs that filed applications therefore, and listed himself as the sole responsible person thereon. He was the sole authorized signatory on the bank accounts of the 12 LLCs, and clearly had authority to sign documents, including checks and tax returns. He set up new operating LLCs in conjunction with expanding the business, and he was fully involved, as noted, in “growing the business” by hiring staff (including Mr. Bovell) as needed, entering into new deals with new parking facilities, and engaging in strategic partnerships. Petitioner testified that the employees, vendors, clients and landlords with whom Alliance and the 12 LLCs did business would come to him if there was a problem, “[b]ecause those are the people I had relationships with.” In view of these facts, petitioner was clearly a person under a duty.

J. As noted, petitioner seeks to place responsibility for the difficulties and ultimate demise of the business, and responsibility for the attendant unpaid sales and use tax liabilities, including accompanying penalties, upon Mr. Bovell. He argues that Mr. Bovell thwarted petitioner’s ability to know, or learn, of the nonfiling of returns and the nonpayment of sales and use taxes, among other liabilities. On this score, it is well established that one cannot absolve himself of liability by simply delegating authority to a subordinate, or by “disregarding their duty and leaving it to someone else to discharge” (*Ippolito* at 1177). In this case, the evidence reflects that

petitioner simply, and essentially, delegated all financial responsibilities, including the obligation to file sales and use tax returns and remit the taxes due thereon, to Mr. Bovell, and relied entirely upon that subordinate to execute those responsibilities. Petitioner did this without thereafter exercising any real oversight or having any mechanisms in place to ensure that such responsibilities were being carried out. This was simply not a reasonable delegation, and does not provide cause to support waiver of penalties.

K. There is no evidence that petitioner took any steps to determine whether the required returns were being filed, or whether the taxes due were, in fact, being paid. Petitioner stated that he directed his attention to the operational aspects of the facilities, and to continuing the growth of the business, noting that he was “in the field a lot,” and admitting that he didn’t look at the mail unless someone brought it to his attention (*see* Finding of Fact 8). There is no evidence of a system of checks and balances being put in place with respect to financial matters, including the payment of the taxes at issue. It is noteworthy that petitioner expressed “concern” about moving payroll functions in-house, allegedly at the request of Mr. Bovell, yet there is no evidence that he took any steps to ameliorate or allay his concerns (*see* Finding of Fact 5). Rather, petitioner chose to simply rely upon the absence of complaints from clients, vendors and others to alert him to any financial problems. There is no evidence that, notwithstanding the assertedly deceitful machinations of Mr. Bovell, petitioner lacked authority to affirmatively access the records of the business so as to confirm its financial circumstances, or to institute systems to ensure compliance with requisite financial obligations to which the business was subject. Instead, the picture that emerges is that petitioner, at best, chose to delegate full responsibility for financial matters, and to place his trust in one individual to carry out the obligations attendant thereto, while focusing his own attentions on other areas of the business. Simply and casually questioning the person to

whom such duties are entrusted, and receiving assurances of compliance from that person, without more, does not constitute reasonable care and attention in confirming that the delegated duties were being carried out. Unfortunately, the fact that petitioner's judgment and trust was apparently misplaced does not lead to a conclusion that petitioner was precluded from assuring that the taxes in question were remitted, or support a conclusion that petitioner's choice to entrust Mr. Bovell with such significant responsibilities, without any real oversight or affirmative acts to ensure that the same were being properly carried out, constituted a reasonable delegation of the authority petitioner that clearly possessed and was under a duty to carry out. In short, petitioner's choice to focus his attention on other business matters does not absolve him of his duty to act, or of the consequences of his failure to have done so.

L. Taxpayers seeking abatement of penalties face an onerous task in establishing that nonfiling, nonpayment, late filing or late payment giving rise to their imposition was due to reasonable cause. "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation" (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992; *affd* 193 AD2d 978 [3d Dept 1993]). The facts in this matter do not support abatement of penalties.

M. The petition of Gregg M. Reuben is hereby denied and the 44 notices of determination, as listed and described at Finding of Fact 14, together with interest and penalties, are sustained.

DATED: Albany, New York
February 15, 2018

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE