

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
VASANTHAKUMARAN SELVARAJAH : **DETERMINATION**
 : **DTA NO. 828104**
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 March 1, 2013 through August 31, :
2015. :

Petitioner, Vasanthakumaran Selvarajah, 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 March 1, 2013 through August 31, 2015.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York on April 12, 2019 at 11:00 a.m., with all briefs to be submitted by August 30, 2019, which date began the six-month period for the issuance of this determination. Petitioner appeared by Alan Goodman, CPA PC (Alan Goodman, CPA, of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie Scalzo, Esq., of counsel).¹

ISSUE

Whether petitioner was a person responsible to collect and pay over sales and use taxes on behalf of 1411 Madison Avenue Corporation.

¹ The Division of Taxation submitted a post-hearing errata sheet listing proposed corrections to the transcript of proceedings held on April 12, 2019. Petitioner has not challenged the proposed corrections. Upon review, the same are hereby accepted as proper corrections to the transcript, and the errata sheet has been appended to the transcript as a part thereof.

FINDINGS OF FACT²

1. 1411 Madison Avenue Corp., d/b/a Seattle Café (the corporation), operated a restaurant and catering business, located at 1411 Madison Avenue, New York, New York.

2. On January 13, 2015, an investigator employed by the Division of Taxation (Division) performed an unannounced observation and survey of the corporation's premises. The investigator noted eight employees working at the premises. The investigator purchased a medium hot tea, and the receipt for that purchase stated that the item purchased was non-taxable. Sales tax was not separately stated on the receipt.

3. The Division assigned an auditor to perform an audit of the corporation, and on December 28, 2015, the auditor mailed an audit appointment letter to the corporation at 397 Gower Street, Staten Island, New York 10314. The appointment letter scheduled the audit, encompassing the period March 1, 2013 through August 31, 2015 (period at issue), to take place on January 15, 2016, and was accompanied by a sales tax examination questionnaire, a responsible person questionnaire, and an information document request (IDR). This IDR, labelled IDR #1, provided a detailed list of the documents and information to be made available for audit, including: sales tax returns; worksheets and canceled checks; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips; cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation;

² Pursuant to 20 NYCRR 3000.15 (d) (6), the Division submitted with its brief proposed findings of fact numbered 1 through 34. With the exception of proposed fact 22, each of the proposed facts are supported by the record, and have been consolidated, condensed, combined, renumbered and substantially incorporated herein (*see* State Administrative Procedure Act [SAPA] § 307 [1]). Proposed fact 22 has been rejected (*see* finding of fact 18, n 5).

depreciation schedules; lease rental agreements; guest checks and cash register tapes for the entire audit period.

4. The corporation did not respond to the foregoing audit appointment letter. In turn, the auditor attempted to contact the corporation by telephoning the number listed on the corporation's application to register for a sales tax certificate of authority (form DTF-17). There was no response to that call.

5. On January 15, 2016, the auditor issued a second audit appointment letter, together with an identical IDR (labelled IDR #2) to the corporation. This letter, scheduling an audit appointment for February 1, 2016, was mailed by certified mail, to both the Gower Street address noted in finding of fact 3, and to the 1411 Madison Avenue address noted in finding of fact 1.

6. On January 22, 2016, the auditor received back a signed certified mail return receipt card for the 397 Gower Street audit appointment mailing. There was no other response to the foregoing mailings.

7. On February 1, 2016, the auditor visited the corporation's location at 1411 Madison Avenue, was advised that the corporation was out of business, and that the owner had "walked out" in August 2015.

8. In light of the corporation's failure to have responded to the foregoing communications, the auditor calculated additional taxable sales and additional tax due based upon the difference between the amount of gross sales reported on the corporation's sales tax returns versus sales reported on its federal income tax returns over the period at issue. More particularly, for the years 2013 and 2014, sales per the corporation's federal returns totaled \$2,698,788.00, while gross sales reported on the corporation's sales tax returns for the same periods totaled \$1,341,637.00, leaving a difference of \$1,357,151.00 and resulting in a reporting error rate

differential of 101.1563%. Since the corporation had not filed its federal income tax return for 2015 as of the time of the audit, the auditor calculated additional sales by applying the foregoing error rate to the corporation's reported gross sales of \$509,506.00 as set forth on its sales tax returns for the sales tax quarterly periods spanning December 1, 2014 through August 31, 2015, resulting in additional gross sales of \$515,398.00. The total additional gross sales in the amount of \$1,872,549.00 (i.e., \$1,357,637.00 plus \$515,398.00) were treated as unreported taxable sales, and resulted in additional sales tax due in the amount of \$151,533.32.

9. On March 17, 2016, the Division issued a notice of determination (L-044509023) assessing additional sales tax due for the period spanning March 1, 2013 through August 31, 2015 in the amount of \$151,533.32, plus interest and penalty, against petitioner as a person responsible to collect and remit sales and use taxes on behalf of the corporation, pursuant to Tax Law §§ 1131 (1) and 1133 (a). This notice was mailed to petitioner at the 397 Gower Street, Staten Island address set forth above.

10. As the result of a conciliation conference, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order dated December 16, 2016 (CMS No. 269882) to petitioner by which the amount of the foregoing assessment was reduced to \$102,533.22, plus interest.³

11. At hearing, petitioner presented the testimony of Phil Cohen, who was hired by petitioner to form the corporation, and to serve as its accountant. Mr. Cohen prepared the corporation's sales and use tax returns from the 2008 inception of its business through August

³ It appears that the Division assessed the corporation for the same additional amount of tax (\$151,533.32), penalty and interest, and that the BCMS order reducing the amount of the assessment against petitioner reflects such a reduction in the same amount that was afforded to the corporation upon its own (separate) challenge to the assessment. Petitioner alleges that he was not involved in the audit of the corporation, or in the BCMS challenge to the corporate assessment., and it appears that the benefit of the reduction to the corporate assessment simply inured to petitioner as a person allegedly under a duty to collect and pay taxes on behalf of the corporation.

2012, and also prepared petitioner's personal income tax returns from the time of the corporation's inception through the year 2017.

12. The corporation was formed by Mr. Cohen, at petitioner's behest, on February 22, 2008, and Mr. Cohen continues to be the corporation's registered agent. The corporation's certificate of incorporation bears the Document ID Number 080222000841. Upon formation, Mr. Cohen provided the "Black Beauty" corporate kit, including various blank corporate documents, to petitioner. Mr. Cohen prepared the corporation's application for federal employer identification number (form SS-4), and listed petitioner, only, as the corporation's responsible party thereon.

13. Mr. Cohen also prepared and filed the corporation's application to register for a sales tax certificate of authority (form DTF-17). The application, dated February 24, 2008, is signed by petitioner, and lists petitioner as the corporation's president and sole responsible person. The application lists the 397 Gower Street address as petitioner's home address and as the corporation's mailing address, and also lists the 1141 Madison Avenue address as the corporation's physical address.

14. Petitioner submitted a business signature card and business depository resolution for Chase bank account No. xxxxxxxxxxxxxx130 in the name of the corporation.⁴ Both of these documents bear signatures dated February 28, 2008, and list a primary identification number matching that on the corporation's certificate of incorporation, i.e., 080222000841. On these documents, Tareq Ahmed is listed as the corporation's president, and Abdul Rahman is listed as the corporation's controller. Petitioner's name does not appear on these documents. Mr. Cohen testified that he was not present when any bank account applications were completed for the corporation.

⁴ Bank account numbers listed herein are partially redacted for privacy purposes.

15. Mr. Cohen provided one of the corporation's bank statements at hearing, describing the same as having been found in an old file in his possession. That statement is for account number xxxxxxxxxxxxxx130, and pertains to the month of May 2009. Among other transactions, it shows transfers, in the amounts of \$300.00 and \$700.00, respectively, to a savings account No. xxxxx1160, and to a checking account No. xxxxx7019, respectively. Mr. Cohen testified that petitioner knew which bank account to subpoena to obtain the signature card and depository resolution for the hearing herein because he (Mr. Cohen) provided the relevant information to petitioner. The record includes no evidence concerning the other two referenced accounts.

16. Mr. Cohen explained that petitioner and the two other named individuals, Mr. Tareq and Mr. Rahman, sought the formation of the corporation. Mr. Cohen stated that petitioner introduced him to Messrs. Tareq and Rahman. He noted he was advised there was a "rush" to form the corporation and start the business, that the three men "had to get a corporation," and that "Mr. Tareq was out of town when the business was starting."

17. Mr. Cohen prepared the corporation's sales and use tax returns until at least 2011, at which time he moved to Florida. He thereafter traveled from Florida to New York and continued to prepare such returns through the sales tax quarterly period ended November 30, 2012. Mr. Cohen handwrote the corporation's sales and use tax returns and sales tax payment checks, and confirmed that it is his handwriting on both the sales tax return and the corresponding sales tax payment check for the period ended November 30, 2012. He also confirmed that it is his signature on the preparer line of the same return. He testified that the signature on the taxpayer line of the return "was probably Arteek," and that Mr. Rahman signed the corresponding sales tax payment check.

18. The corporation's sales and use tax returns for the quarterly periods spanning February

29, 2008 through November 30, 2012 list the 397 Gower Street address for the corporation, after which the corporation's address on such returns changed to 245 West 38th Street, New York, New York. Comparison reveals that the signature appearing on the taxpayer line of the corporation's sales and use tax returns for at least the periods ended May 31, 2008, August 31, 2008 and November 30, 2008, is similar to petitioner's signature as appearing on the power of attorney form and the petition filed in this matter. However, each of these signatures is, in fact, illegible.⁵ Mr. Cohen confirmed that his signature appears on the preparer line of those returns, that he prepared the returns and the corresponding sales tax payments checks, and that Mr. Rahman appears to have signed the payment checks.

19. Petitioner received the corporation's tax mailings at the 397 Gower Street address, and this address is listed as petitioner's address on the petition and on the power of attorney filed with the petition.

20. None of the corporate income tax returns in evidence reflect the payment of compensation to any officers or directors of the corporation. Petitioner received wage and tax statements (forms W-2) from the corporation for the years 2008 through 2014 reporting income (wages, tips and other compensation) in the aggregate amount of \$100,540.00. Petitioner's personal income tax returns also reflect his receipt of income, on forms W-2, from other entities, including Pizza Mercato 2 LLC, Anika Enterprises, Inc., and Manhattan's Best Pizza. Though Mr. Cohen prepared petitioner's personal income tax returns, he was unable, in testimony, to provide any information as to the bases upon which this income was paid to petitioner.

⁵ The Division's proposed fact number 22 affirmatively states that the signature on the taxpayer line of the noted returns is petitioner's signature, based upon the signature comparisons described above. This affirmative statement is rejected in that, while the signatures are indeed somewhat similar, they are all illegible. Hence, an affirmative finding of fact that the signature is petitioner's signature would require an admission by petitioner or a statement by a qualified witness (i.e., one who witnessed the affixation of the signature, or one qualified as an expert in handwriting analysis).

21. Mr. Cohen stated that he has never been to the corporation's physical location at the 1411 Madison Avenue address, was never present at any meetings where corporate affairs were discussed, and was never present when petitioner, Mr. Tareq and Mr. Rahman discussed anything. He did not know whether petitioner had ever asked others involved in the corporation to remove petitioner's name from the business, and stated that Messrs. Tareq and Rahman never instructed him not to speak with petitioner about the corporation. Mr. Cohen noted that petitioner never asked him anything about the corporation's affairs. Notwithstanding the forms W-2 described above, Mr. Cohen stated that he did not know of any other businesses in which petitioner may have been involved, and did not ask petitioner whether he was part of certain other businesses. Beyond the described activities in forming the corporation, Mr. Cohen's only ongoing involvement with the corporation appears to have been limited to going to an office located at West 38th Street once every three months "where Mr. Tareq had a business with an upstairs office," for the purpose of preparing the corporation's quarterly sales tax returns. Mr. Cohen described the process of preparing the returns to consist of being provided with the corporation's bank statements, from which he calculated the corporation's sales and its sales tax liability, and in turn preparing a check in payment for such liability and leaving the same to be signed and submitted. It appears the corporation's income tax returns were prepared by a different accountant or accounting firm.

22. Petitioner raised no challenge to the audit methodology employed by the Division, or to the amount of tax determined and assessed herein as a result thereof. Petitioner was present at the hearing held in this matter, but chose not to testify.

CONCLUSIONS OF LAW

A. Tax Law § 1133 (a) states 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 . . .” Tax Law § 1131 (1) in turn defines a “person required to collect any tax imposed by this article [article 28]” 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 . . .”

B. Whether a person is a responsible officer must be determined based upon the particular facts of each case (*see Matter of Coppolla v Tax Appeals Tribunal*, 37 AD3d 901 [3d Dept 2007]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [3d Dept 1991]). Factors stated by the Division’s regulations include whether the person was authorized to sign the corporate tax return, responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (*see* 20 NYCRR 526.11 [b] [2]).

C. In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the Tribunal stated:

“[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 564, 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 862, 865; *Chevlowe v. Koerner*, *supra*, 407 NYS2d 427, 429; *Matter of William D. Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin*, *supra*; *Matter of Autex Corp.*, *supra*.)”

D. Petitioner maintains that he had nothing to do with operating the corporation's business. Petitioner points out that he did not have signature authority over the one corporation bank account with respect to which there is evidence in the record (*see* finding of fact 14). He notes that account was used by the corporation to pay its sales and use tax liabilities, and claims that he did not in fact sign the checks for payment of such taxes. Petitioner further asserts that he did not sign payroll or any other checks on behalf of the corporation, and did not sign the corporation's income tax returns. Petitioner admits that he caused the corporation to be formed, but then claims that he "walked away" with no intent to transact any business via the corporation. Petitioner alleges that others took the corporate documents and started to transact business without his involvement.

E. Juxtaposed against petitioner's foregoing claims are the fact that petitioner hired Mr. Cohen to form the corporation, and to be its accountant. Mr. Cohen in fact formed the corporation on February 22, 2008, listing himself as the corporation's registered agent, and in turn he gave the blank corporate documents to petitioner. Mr. Cohen also prepared the corporation's applications to obtain a federal employer identification number, on which petitioner is listed as the corporation's sole responsible person, and its application to obtain a sales tax certificate of authority. That latter document, dated February 24, 2008, is signed by petitioner, and he is listed thereon as the corporation's president and sole responsible person for purposes of sales tax compliance. The application lists both the corporation's business premises address, i.e., 1411 Madison Avenue, New York, New York, and the corporation's mailing address, i.e., 397 Gower Street, Staten Island, New York. Such latter address is petitioner's home address.

F. As noted, petitioner contends that he cannot be deemed a responsible person under a

duty to act because he was uninvolved in the operations of the corporation. He maintains that others, Mr. Tareq and Mr. Rahman, actually operated the business. To prevail on this argument, petitioner was required to establish by clear and convincing evidence that he was not a person under a duty to act, or that, assuming he had the necessary authority so as to be under a duty to act, he was thwarted by others in carrying out his duties through no fault of his own (*see Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). It is well established that one cannot absolve himself of liability by simply delegating authority to a subordinate, or by disregarding his own duty and leaving it to someone else to discharge (*see Matter of Reuben*, Tax Appeals Tribunal, August 27, 2019; *Blodnick v New York State Tax Commn.*, 124 AD2d 437 [3d Dept 1986]).

G. In proceedings before the Division of Tax Appeals, petitioner bears the burden of proving, by clear and convincing evidence, that a notice of determination is erroneous or incorrect (*see Matter of Goodfriend*). Based upon a careful review of the record, petitioner has failed to meet his burden of establishing that he was not under a duty to act on behalf of the corporation to assure that sales and use taxes were collected and paid (*Id.*; *see Matter of Silverstein*, Tax Appeals Tribunal, December 7, 2017; *Matter of Wendel*, Tax Appeals Tribunal, February 3, 2000). Summarized most directly, petitioner seeks to absolve himself of any responsibility on the basis that while he, and others, formed the corporation, he thereafter simply walked away and was entirely uninvolved in or with the corporation's business. However, the record includes clear evidence that petitioner initially identified himself to the Division as the only person under a duty to comply with the corporation's sales tax filing and payment obligations. In this regard, he alone was listed as holding the title of president and as the sole responsible person on the corporation's business filings at the time of its formation, including

specifically its application for a sales tax certificate of authority (*see* findings of fact 12 and 13). He accepted possession of the corporation's documents immediately after its formation (*see* finding of fact 12), and his home address is listed as the corporation's mailing address thereon, as well as on its sales tax returns for many subsequent years. These actions show that petitioner expressly accepted responsible party liability (*see Matter of Luongo*, Tax Appeals Tribunal, July 10, 1992, *confirmed Luongo v Tax Appeals Trib.*, 117 AD3d 1286 [3d Dept 2014]). While petitioner notes that he did not sign payroll or other corporate checks, and he is not listed as having signatory authority on the corporation's bank account number xxxxxxxxxxxxxx130, the bank statement in evidence for that account references transfers to two other accounts, and there is no signature authority or other information provided with respect to such latter accounts (*see* findings of fact 14 and 15). In addition, petitioner received the benefit of income paid to him by the corporation for the years 2008 through 2014 (*see* finding of fact 20). While set forth on forms W-2 as wages, tips and other compensation, the record discloses nothing as to the nature or extent of the services rendered to the corporation in return for which petitioner received this income. While petitioner maintains that others operated the corporation's business, there is no evidence establishing that petitioner's authority over corporate affairs, as initially accepted, was either voluntarily given up or forcibly taken from him, or that petitioner was in any manner thwarted or precluded by other persons in his ability to undertake or carry out the responsibilities that accompany such authority, including specifically the responsibility to collect, account for and pay over sales and use taxes (*see Matter of Womble*, Tax Appeals Tribunal, August 17, 2006). In sum, there is no evidence to show that petitioner's authority and accompanying responsibilities, as undertaken at the outset, were in any manner abrogated. An individual may not undertake such authority and then avoid the consequences of failing to carry out the attendant

responsibilities by the simple expedient of “walking away” (*see Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994). Finally, while petitioner was present at the hearing in this matter, he chose not to provide testimony regarding his involvement in the corporation and its affairs. Petitioner’s choice not to testify may properly be construed against him, since it may reasonably be inferred that his testimony would not have been favorable to his claims (*see Matter of Meixsell v Commr. of Taxation*, 240 AD2d 860 [3d Dept 1998]). Ultimately, any questions or inconsistencies that might have been addressed and potentially resolved in petitioner’s favor simply remain unexplained.

H. The petition of Vasanthakumarian Selvarajah is hereby denied and the notice of determination dated March 17, 2016, as reduced by the conciliation order dated December 16, 2016, is sustained.

DATED: Albany, New York
February 27, 2020

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE