

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
PETER PAPPAS : DETERMINATION
for Revision of Determinations or for Refund of : DTA NOS. 822124
Sales and Use Taxes under Articles 28 and 29 of : AND 822125
the Tax Law for the Periods March 1, 2004 through :
May 31, 2004, March 1, 2005 through August 31, 2005, :
June 1, 2004 through February 28, 2005 and :
September 1, 2005 through November 30, 2005. :
:

Petitioner, Peter Pappas, 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 March 1, 2004 through May 31, 2004, March 1, 2005 through August 31, 2005, June 1, 2004 through February 28, 2005 and September 1, 2005 through November 30, 2005.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on October 24, 2013 at 10:30 A.M., with all briefs to be submitted by February 24, 2014, which date began the six-month period for the issuance of this determination. Petitioner appeared by Kestenbaum & Mark, Esqs. (Bernard S. Mark, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether petitioner was properly held personally liable, pursuant to Tax Law § 1131(1) and § 1133(a), for the unpaid sales and use taxes owed by W. Pappas, Inc., and by Double Papas, Inc., for the periods March 1, 2004 through May 31, 2004, March 1, 2005 through August 31,

2005, June 1, 2004 through February 28, 2005 and September 1, 2005 through November 30, 2005.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Peter Pappas, 11 notices of determination assessing sales and use taxes due, plus interest and penalty. The notices are predicated on the position that petitioner is liable as an officer or person responsible to collect and remit sales and use taxes on behalf of two corporate entities, W. Pappas, Inc., and Double Papas, Inc. Petitioner does not challenge the dollar amounts of tax, interest or penalty assessed. Rather, and as stipulated by the parties, petitioner disputes only the Division's claim that he was an officer or person responsible to collect and remit taxes on behalf of the two corporations. The following tables set forth information concerning the individual notices at issue herein:

TABLE ONE

CORPORATE ENTITY	SALES TAX PERIOD	NOTICE NUMBER	AMOUNT
W. Pappas, Inc.	06/01/04 - 08/31/04	L-026982270	\$5,438.92
W. Pappas, Inc.	09/01/04 - 11/30/04	L-026982269	\$5,438.92
W. Pappas, Inc.	12/01/04 - 02/28/05	L-026982268	\$5,438.92
W. Pappas, Inc.	09/01/05 - 11/30/05	L-026982265	\$2,911.79

TABLE TWO

CORPORATE ENTITY	SALES TAX PERIOD	NOTICE NUMBER	AMOUNT
W. Pappas, Inc.	03/01/04 - 05/31/04	L-026982271	\$5,438.93
W. Pappas, Inc.	03/01/05 - 05/31/05	L-026982267	\$2,911.80
W. Pappas, Inc.	06/01/05 - 08/31/05	L-026982266	\$2,507.89

TABLE THREE

CORPORATE ENTITY	SALES TAX PERIOD	NOTICE NUMBER	AMOUNT
Double Papas, Inc.	12/01/04 - 02/28/05	L-027023908	\$6,378.95
Double Papas, Inc.	09/01/05 - 11/30/05	L-027023905	\$4,153.96
Double Papas, Inc.	03/01/05 - 05/31/05	L-027023907	\$4,153.97 ¹
Double Papas, Inc.	06/01/05 - 08/31/05	L-027023906	\$3,780.64

2. The dollar amounts set forth above represent tax only. In addition:

a) For the sales tax periods pertaining to the four assessments set forth in Table One and to the first two assessment set forth in Table Three, the respective corporate entities did not file sales tax returns. Each of the assessments set forth for these periods is a Notice of Estimated Determination and for each, interest plus statutory penalty based upon failure to file are assessed.

b) For the sales tax periods pertaining to the first two assessments set forth in Table Two and to the third assessment set forth in Table Three, the corporate entities did not file sales tax returns in a timely manner and did not pay the taxes stated to be due thereon. Each of the assessments for these periods is a Notice of Determination and for each, interest plus penalty for late filing and failure to pay are assessed.

c) For the sales tax periods pertaining to the third assessment set forth in Table Two and to the fourth assessment set forth in Table Three, the corporate entities failed to pay the tax stated to be due on the returns filed for such periods. Each of the assessments for these periods is a Notice of Determination and for each, interest plus penalty for failure to pay are assessed.

3. Petitioner, Peter Pappas, received a degree in computer engineering from Stony Brook University. He has been involved in the import and export food business continuously since 1985. Prior to, during and after the periods at issue herein, he devoted 100% of his working time

¹ The parties agreed that the assessment for this period has been paid in full.

to, and earned 100% of his income in connection with, this import and export business and the sales associated therewith.

4. Petitioner was a long-time friend of one Nicholas Papamichael, from the time that the two were in their mid-twenties. Mr. Papamichael was described by petitioner as being a “Wall Street guy.” In or about 2003, petitioner was invited by Mr. Papamichael to invest in two donut shop franchises, known as Twin Donuts, to be located in the Bronx. Petitioner described this invitation as “[Mr. Papamichael] was a Wall Street guy and . . . I don’t know what happened, . . . but he came out of being a Wall Street guy and he came to me and asked me if I wanted to open up a couple of donut shops, invest with him.”

5. On September 22, 2003, Mr. Papamichael formed the two corporations known as Double Papas, Inc., and W. Pappas, Inc. The address listed for each entity is the same as Mr. Papamichael’s home address. These entities were used to secure the Twin Donut franchises. Petitioner invested approximately \$250,000.00 and also contributed a lease he held to premises located at 402 Hunts Point Avenue, Bronx, New York, that had been given to him in 2003 by a friend upon the closing of that friend’s business at that location. At inception, the Hunts Point donut shop franchise was operated by W. Pappas, Inc., while the other donut shop franchise, located at 140-03 Fordham Road, Bronx, New York, was operated by Double Papas, Inc.

6. Petitioner owned 45% (90 shares) of each corporation. Mr. Papamichael’s wife, Kathleen, also owned 45% (90 shares) of each corporation. According to petitioner, “[Mr. Papamichael] couldn’t sign his name on things, I guess, so he put his wife instead.” Approximately three months after the venture commenced, one Angela Pirsos became a minority owner of each of the corporations, investing \$50,000.00 in exchange for her 10% (20 shares)

stake in each corporation.² In connection with securing the Twin Donut franchises petitioner signed the franchise agreements as well as a personal guarantee of liability in favor of the franchisor (Twin Donuts/Spartan Built, Ltd.).

7. Petitioner did not involve himself in the day-to-day operation of either of the donut shops. He had no direct involvement with the employees, suppliers, purchasers, attorneys, accountants or creditors of either of the corporations, and Mr. Papamichael, as opposed to petitioner, dealt with the franchisors, and with the daily operations of the two donut shops. Petitioner admitted having signature authority on the corporations' bank accounts and, at the request of Mr. Papamichael, petitioner occasionally signed a corporate check or a tax return as described hereinafter. In this regard, petitioner explained that he stopped at the store locations on occasion for coffee or a donut, or stopped in if Mr. Papamichael told him something needed to be signed.

8. Petitioner hoped to receive payments from the operation of the donut shops as a return on his investment. In this regard, he received checks during the first four or five months that the businesses were in operation, but received nothing thereafter. The amounts he received were not specified in the record. Thereafter, and in response to his inquiries to Mr. Papamichael about receiving further payments, petitioner was told that there was no money. Petitioner did not attempt to review the books and records of the corporations, but he assumed the same existed and were being kept as required. Petitioner stated he viewed such matters, including the filing of tax returns and payment of bills and taxes, as "Nick's responsibility."

² Angela Pirsos is the spouse of Milton Pirsos, an accountant who prepared petitioner's personal income tax returns. There is no indication that either Angela or Milton Pirsos were acquainted with Mr. Papamichael, other than through knowing petitioner.

9. Review of the signature affixed to the tax returns and checks included in evidence discloses the following:

Double Papas, Inc.

a) Petitioner's name is listed under the title of president and he confirmed that the signature on the New York State and Local Quarterly Sales Tax Return (Form ST-100) filed for the quarterly period ended May 31, 2004 was his. He denied that the signature on the check associated with such return was his.

b) The Form ST-100 filed for the period ended November 30, 2004 again lists petitioner's title as president. This return is unsigned.

c) The General Business Corporation Franchise Tax Return Short Form (Form CT-4) for the year 2003 and the New York S Corporation Franchise Tax Return Short Form (Form CT-4-S) for the year 2004 each bear an illegible signature next to the title president. Petitioner denied that the illegible signature on these returns was his.

d) The signature box for petitioner's signature on the Resident Income Tax Return (Form IT-201) filed by petitioner (and his spouse) for the year 2004 bears an illegible signature. This signature, though illegible, is strikingly similar to the signatures appearing on the tax returns described above in Finding of Fact 9-(a) and (c), and is somewhat dissimilar to the signature on the check described in Finding of Fact 9(a).

W. Pappas, Inc.

e) Petitioner is listed under the title of president on the Form ST-100 for the period ended May 31, 2004. Petitioner denied that the signature on such return was his. He confirmed that the signature on the check associated with this return was his.

f) Forms CT-4-S for the year 2004 and CT-5 (Request for Six-Month Extension to File), and two checks associated therewith, bear illegible signatures next to the title president. Each of these signatures is strikingly similar to each other and to the signatures appearing on the tax returns described above in Finding of Fact 9(a) and (c), to the signature appearing on the Form IT-201 described above in Finding of Fact 9(d), and to the signature on the check described above in Finding of Fact 9(e). These signatures are dissimilar to the signature on the Form ST-100 described above at Finding of Fact 9(e).

10. The check drawn on the account of Double Papas, Inc., in payment of sales tax liability for the period ended May 31, 2004 (*see* Finding of Fact 9[a]) as included in the record and described above is dated June 20, 2004. The check drawn on the account of W. Papas, Inc., in payment of sales tax liability for the period ended May 31, 2004 (*see* Finding of Fact 9[e]) as included in the record and described above is dated June 21, 2004. The two checks drawn on the account of W. Pappas, Inc., in payment of corporation tax liability for the years 2003 and 2004 (*see* Finding of Fact 9[f]) as included in the record and described above are dated, respectively, March 10, 2004 and March 14, 2005.

11. Petitioner claims to have had no contact with Mr. Papamichael after the middle of 2004. According to petitioner, Mr. Papamichael physically changed the locks on the doors and gates at each of the corporations' premises at some point in or about mid-2004.

12. On November 26, 2003, Mr. Papamichael formed Feel the Steel Corp., and on December 9, 2003 he formed Hellenic Donut, Inc. The address listed for each of these entities is the same as Mr. Papamichael's home address. At some point in 2004, and allegedly in connection with petitioner being locked out of the premises, these entities took over the operations of the two donut franchise locations, with Hellenic Donut, Inc., replacing Double Papas, Inc., as the operator at the Fordham Road location, and Feel the Steel Corp. replacing W. Pappas, Inc., as the operator at the Hunts Point location. These entities operated under the name "Sugar Ray's Coffee Shop."

13. On March 16, 2006, i.e., after the periods at issue herein, Mr. Papamichael formed an additional corporation known as Bag Guyz, Inc. The address listed for this entity was, again, the same as Mr. Papamichael's home address. In addition, one Nick Kapelonis is listed as the registered agent for this entity. In or about March 2006, the operation of Hellenic Donut, Inc., at

Fordham Road closed. Mr. Papamichael removed all of the equipment and opened a pizzeria (using the same equipment) operating under the name “Sugar Ray’s Pizza” at 1119 Longwood Street, Bronx, New York. Petitioner stated that Mr. Kapelonis was brought in “as a partner” by Mr. Papamichael.

14. In or about November 2005, petitioner retained an attorney to commence legal action against Mr. Papamichael and others, and to defend against a lawsuit filed by the franchisor against petitioner under the personal guarantee signed by petitioner at the time of his initial involvement (*see* Finding of Fact 6). Petitioner proposed to sell his shares in W. Pappas, Inc., and Double Papas, Inc., to Mr. Papamichael. An agreement memorializing this proposal was prepared, including the admission by Mr. Papamichael that he was the sole operator of the businesses from their inception and indemnifying petitioner from liability in connection with the operation of the businesses. This agreement was signed by petitioner but was never signed by Mr. Papamichael.

15. On May 31, 2007, petitioner, together with Milton and Angela Pirsos, filed a summons and verified complaint in Supreme Court, Nassau County, New York, against a number of named defendants including Nick and Kathleen Papamichael, Anthony Tsaros, Nicholas Marchese, Feel the Steel, Inc., Kayzee Realty Corp., Hellenic Donut, Inc., Twin Donut, Inc., TDS Leasing, LLC, and Spartan Built, Ltd. The complaint alleged, among other items, that petitioner was fraudulently induced to enter into the agreement upon the promise of an equal share of the profits of the two donut shops, but in fact he received no information regarding the shops’ operations and no profits save for the initial checks (*see* Finding of Fact 8).

16. By affidavit filed in connection with an action commenced against petitioner by the franchisor,³ petitioner stated, among other items, that he was fraudulently induced to execute the personal guarantee of liability when the franchisor had knowledge that petitioner was not a working partner but rather was merely an outside investor with little knowledge of the business.

17. The record does not disclose any specifics concerning resolution of the lawsuits described above. W. Pappas, Inc., and Double Papas, Inc., were dissolved by proclamation on January 27, 2010. Petitioner eventually filed for bankruptcy protection and was discharged.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

B. The mere holding of corporate office does not, per se, impose tax liability upon an office holder (*Matter of Chevlowe v. Koerner*, 95 Misc 2d 388 [1978]). Rather, whether a person is an officer or employee liable for tax must be determined upon the particular facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022 [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]). As summarized in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and

³ In this action, the franchisor/plaintiffs were Twin Donut, Inc., and Spartan Built, Ltd.

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 (citations omitted).

C. In terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino*; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990; *see also Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). One in a position of responsibility cannot escape the same by disregarding or delegating such responsibility to others to discharge. (*Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707 [1982]; *Matter of Blodnick v. State Tax Commn.* 124 AD2d 437 [1986]; *Matter of Shah*, Tax Appeals Tribunal, February 25, 1999).

D. Petitioner bears the burden of proof to overcome the presumed correctness of the Division's assessments (*Matter of Mera v. Tax Appeals Tribunal*, 611 NY2d 716 [1994]; *Matter of Blodnick v State Tax Commn.*). In order to prevail, "petitioner was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own (citations omitted)" (*Matter of Goodfriend*). Petitioner has failed to sustain his burden of proof.

E. Petitioner's claim rests mainly upon his assertion that he was not involved in the day-to-day affairs of the corporations but instead worked full time in his import/export business. Petitioner asserts that he was merely an outside investor in the two franchises, and that although

he may have been listed as an owner and officer (president), he did not have any responsibility to the corporations and that Mr. Papamichael was responsible for handling corporate affairs and running the stores. Essentially, petitioner maintains that he was a mere investor who was duped by Mr. Papamichael, a longtime trusted former friend. In contrast, however, the evidence shows that petitioner invested a significant amount of money and also contributed a leasehold to premises used as the business location for one of the corporate entities. He signed the franchise agreements and also a guarantee of personal liability to the franchisors in connection therewith. He was also listed as holding the title of president, and was one of two majority stockholders of each of the corporations. He admitted having signature authority over the corporations' bank accounts and authority to sign documents including checks and tax returns on behalf of the corporations. These latter items carry with them more than the level of responsibility typically held by a mere outside investor.

F. Petitioner's decision to rely on others and not be directly involved in operational matters does not relieve him of liability for the unpaid taxes at issue herein (*Matter of Krone*, Tax Appeals Tribunal, September 19, 1991). It is well established that more than one person can be held liable as a responsible officer under the statute, and such liability is joint and several (*see Matter of Blodnick v. State Tax Commn.*; *Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991; *Matter of Hurley*, Tax Appeals Tribunal, July 16, 1998). In this regard, Tax Law § 1133(a) provides 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" (emphasis added), thereby creating joint and several liability for unpaid sales tax (*Matter of Phillips*, Tax Appeals Tribunal, May 11, 1995). The Division is under no obligation to pursue other responsible persons before proceeding against petitioner (*Matter of Risoli v.*

Commissioner of Taxation and Finance, 237 AD2d 675 [1997]).⁴ Moreover, there is no evidence to show that petitioner did not have or could not have exercised sufficient authority and control over the corporations' affairs during the periods at issue herein so as to be excused from responsibility for their tax obligations (*see Matter of Shah*, Tax Appeals Tribunal, February 25, 1999). Although petitioner maintains that others (specifically Mr. Papamichael through his wife's ownership interests) had full control over the businesses, petitioner failed to present any corporate documents, including corporate minutes, establishing the same. Instead, it appears petitioner simply chose not to engage in any involvement or exercise any authority from the outset. Indeed, there is no indication that petitioner asked to see the corporate books or bank statements or inquired as to the filing of tax returns, notwithstanding the presence of certain factors, including the essentially unexplained "inability" of Mr. Papamichael to sign documents or hold ownership of the entities, that would have made it clearly prudent for petitioner to have done so. It is likely that, at some point in time, information was deliberately withheld from petitioner, that he was misled with respect to the corporations' tax obligations and that, ultimately, he was affirmatively precluded from participation in the corporate duties by the actions of Mr. Papamichael. However, the time frame after which petitioner was unable to exercise the foregoing authority to access and examine the books and records of the corporations and take necessary action is not clearly specified in the record.

G. Petitioner contends that he should not be held responsible because he never possessed any actual authority to pay sales taxes. Petitioner claims that the actions of Mr. Papamichael effectively thwarted him from having access to the corporations' records and thus precluded his

⁴ Documents in the record reveal that the Division has, in fact, pursued another person potentially jointly liable for the amounts and periods in issue here.

ability to take any action on behalf of the corporations. Petitioner's arguments, at least concerning the periods at issue herein, are unavailing. The record does not include the articles of incorporation, corporate bylaws or minutes of any corporate meetings. Petitioner was a corporate officer and one of two major shareholders of the corporations and, as such, had a fiduciary duty to the corporations in complying with the corporations' tax obligations (*see Matter of Martin v. Commissioner of Taxation & Fin.* at 891; *Matter of Goodfriend*; *Matter of Ross*, Tax Appeals Tribunal, August 1, 1996). The controlling consideration is the authority to act and not the degree to which one actually exercises that authority (*Matter of Coppola v. Tax Appeals Trib. of the State of NY*, 37 AD3d 901 [2007]; *accord Matter of Ippolito v. Tax Appeals Trib. of the State of NY*, 116 AD3d 1176 [2014]). Essentially, petitioner chose to trust Mr. Papamichael and to delegate the responsibility for the management of the corporations' financial matters to him. The record contains no evidence of any restrictions on petitioner's ability or authority to inspect the corporate books and records during the periods at issue. Rather, it appears he simply never asked to do so. The record reveals no real inquiries or efforts to assure compliance with the corporations' tax obligations. In fact, there is no evidence as to petitioner's efforts, if any, to obtain the corporations' books and records at any time prior to retaining an attorney at some point in or about late 2005. Petitioner simply did not undertake any responsibility for the management of the corporations' financial and operational matters, leaving the same to Mr. Papamichael, and he exercised no oversight or inquiry over how the financial aspects of the businesses were carried out. Such inaction does not excuse petitioner from responsibility (*Matter of LaPenna*). As noted, and at a minimum, the manner in which the corporations were set up, including petitioner's admitted knowledge that Mr. Papamichael could not sign

documents, should have reasonably alerted petitioner to the need to be more vigilant concerning how the corporations were being operated.

H. Petitioner has raised no specific arguments in support of abatement of the penalties assessed in this matter (*see* Finding of Fact 2). Accordingly, petitioner is a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131(1) and 1133(a) and is personally liable for the sales taxes, plus interest and penalties, assessed as due on behalf of Double Papas, Inc., and W. Pappas, Inc., for the periods at issue herein.

I. The petitions of Peter Pappas are hereby denied and the notices of determination specified in Finding of Fact 1, together with penalties and such interest as is lawfully owing, are sustained.

DATED: Albany, New York
August 21, 2014

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE