

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**GERARD F. BINDER** :  
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 December 1, 1983 :  
through February 28, 1986. :

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DECISION  
DTA Nos. 805624  
and 809527

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of :  
**GERARD F. BINDER** :  
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 September 1, 1984 :  
through August 31, 1987. :

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Petitioner Gerard F. Binder, 75 Main Street, Roslyn, New York 11576, filed an exception to the determination of the Administrative Law Judge issued on August 27, 1992. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner submitted a letter brief in support of his exception. The Division of Taxation submitted a memorandum of law in response. Petitioner filed a reply. Petitioner's request for oral argument was denied. The six-month period to issue this decision began on April 21, 1993, the date petitioner's reply brief was received.

Commissioner Jones delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

**ISSUES**

I. Whether petitioner was a person responsible for the collection and remittance of sales and use taxes on behalf of Musikahn Corporation and Jack Kahn Music Co., Inc., pursuant to sections 1131(1) and 1133(a) of the Tax Law so as to render him personally liable for such taxes.

II. Whether, if petitioner was personally liable for taxes due from Musikahn Corporation, he established that failure to pay such taxes was due to reasonable cause and not to willful neglect.

**FINDINGS OF FACT**

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On October 27, 1986, the Division of Taxation ("Division") issued to petitioner, Gerard F. Binder, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (number S861025470C) for the period December 1, 1984 through May 31, 1985, assessing sales and use taxes due as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>
February 28, 1984	\$15,645.23	\$ 3,911.38	\$ 5,741.39
February 28, 1985	77,582.58	18,619.81	16,480.41
May 31, 1985	17,555.66	3,686.68	3,095.20

The notice states that petitioner is liable for these taxes under sections 1131(1) and 1133 of the Tax Law as an officer of Jack Kahn Music Co., Inc. ("Jack Kahn").

The Division issued a second notice (S86102971C) to petitioner which was also a subject of these proceedings; however, at the outset of the hearing, the Division conceded that all taxes assessed by that notice had been paid and that the notice should be cancelled.

The tax assessments for the periods remaining in issue were based upon sales tax returns filed by the corporation without remittance of the tax shown as due. Pursuant to a conciliation order dated March 25, 1988, the amount of the tax assessment was reduced to \$95,138.24. This

resulted from cancellation of the tax assessed for the quarter ended February 28, 1984 in the amount of \$15,645.23.

Jack Kahn filed a quarterly sales tax return for the quarter ending February 28, 1985, showing a total tax liability for the quarter of \$133,067.76 and prior monthly payments of \$101,702.41, resulting in a balance due of \$31,365.35. The Division's computerized accounts receivable records show total payments for the quarter of \$55,485.18, leaving a balance due of \$77,582.58. The Division's records also show that a notice and demand was issued to Jack Kahn on November 13, 1985, based upon the filed return.

Jack Kahn also filed a sales tax return for the quarter ending May 31, 1985, showing total tax due of \$17,555.66. No tax was remitted with the filing of the return.

Prior to 1980, petitioner was a 50 percent shareholder of Jack Kahn which owned and operated a string of retail stores selling pianos and organs in the metropolitan New York area. In 1980, a second corporation, Musikahn Corporation ("Musikahn"), was formed in order to facilitate the combination of Jack Kahn and Keyboard Enterprises, a company in which petitioner had an investment interest. Musikahn, essentially a holding company, held a 50 percent interest in Jack Kahn. Petitioner was the chief executive officer of Musikahn and owned 80 percent of its stock. Arthur Wachs, who operated Keyboard before its combination with Jack Kahn, became the senior executive vice president and chief operating officer of MusiKahn and held 20 percent of its stock. Prior to March 1985, Musikahn acquired 100 percent of the stock of Jack Kahn.

Petitioner and Mr. Wachs divided responsibility for the operation and management of Musikahn between themselves. From 1980 through April 1985, Mr. Wachs was primarily responsible for administration and bookkeeping. Mr. Wachs had the authority to and did sign checks on behalf of Musikahn and maintained the corporate books and records. To assist him in carrying out his duties, he replaced some of Jack Kahn's employees with former Keyboard employees, including a Mr. Elkadi who was comptroller of Musikahn. Petitioner was primarily responsible for sales, marketing, and advertising.

Shortly after the formation of Musikahn, petitioner discovered that the company was in poor financial shape, a circumstance he attributed primarily to the financial condition of Keyboard. In addition, the company suffered from the nationwide recession of 1982. Musikahn struggled financially through the end of 1983 as petitioner undertook steps to keep it in business. Several stores were closed, debts were satisfied and the company was restructured, so that, by the end of 1983, Musikahn showed a small profit. However, the capital of Jack Kahn was almost exhausted in the process. At about this point in time, petitioner was approached by a broker who suggested that Musikahn "go public". Petitioner anticipated that the sale of Musikahn stock on the public exchange would supply a needed infusion of capital, and he agreed to the proposal.

From about September of 1984 through March 1985, petitioner was primarily involved in overseeing Musikahn's public offering of stock. This involved working with financial and legal professionals to prepare a prospectus for filing with the Federal Securities and Exchange Commission ("SEC") and seeking potential investors. At the same time, Musikahn continued to suffer from financial setbacks. As of June 1984, Musikahn had a negative net worth and negative working capital. Between the commencement of the public offering and the closing in March 1985, sales continued to decline. Shortly after the public offering was completed, the credit corporation that financed Musikahn's inventory of pianos and organs collected all monies owed it and advised Musikahn that it would no longer extend credit. At that point, Musikahn was faced with substantial debts and little or no cash flow.

As of April 17, 1985, Arthur Wachs resigned as an officer and director of Musikahn and ceased his employment with that company. Petitioner continued as chief executive officer of Musikahn and became primarily responsible for its administration and operation. He was convinced that the company could be made financially solvent and continued to work toward this goal.

Petitioner caused Musikahn to file a petition for reorganization under chapter 11 of the Bankruptcy Code on October 22, 1985. Musikahn continued to operate as a debtor-in-

possession pursuant to an order of the United States Bankruptcy Court of the Eastern District of New York issued on October 29, 1985. The order authorized Musikahn to enter into a financing agreement with General Electric Credit Corporation ("GECC"). By the terms of that agreement, Musikahn was to turn over to GECC all proceeds of the sale of its merchandise and any outstanding receivables. In turn, GECC was authorized to retain a portion of the proceeds in satisfaction of Musikahn's pre-bankruptcy and post-bankruptcy debts to GECC. The remainder of the proceeds were to be applied directly by GECC to Musikahn's operating expenses. As pertinent to these proceedings, the order of the Bankruptcy Court states:

"Lender is hereby permitted to deliver to Debtor in Possession the following amounts of Cash Collateral from proceeds of Pre Petition Collateral and Post Petition Collateral which have been deposited into the Depository Account and have cleared:

\* \* \*

"(ii) The payment made by each buyer for sales taxes or other applicable taxes on an item of either Pre Petition or Post Petition Collateral."

Musikahn continued to maintain its own records of sales and of sales tax collected and accrued; however, since all monies collected were deposited in a GECC account, Musikahn was required to request that GECC issue checks to New York State to be applied to sales taxes due. In practice, this sometimes resulted in delay of payment and inadequate recordkeeping. There is no evidence in the record that GECC failed to issue checks when instructed to do so by petitioner, although it did not necessarily do so on a timely basis.

Despite petitioner's efforts, Musikahn never recovered financially. On June 21, 1989, an order for relief converting the chapter 11 case to a liquidation case under chapter 7 was entered by the Bankruptcy Court. On June 27, 1989, an interim trustee was appointed, and he continued as the permanent trustee. The debtor's property was completely liquidated during the course of numerous attempt to fund the proposed plan of reorganization. In an attempt to save Musikahn, petitioner put all of his personal assets into the company. This included mortgaging his home to pay off corporate debts and to keep Musikahn operating.

Prior to the filing of the voluntary petition in bankruptcy, the SEC, undertook an investigation of petitioner for possible stock fraud and stock manipulation in connection with the public offering of Musikahn's stock. As a result of the investigation, petitioner pleaded guilty in 1990 to two counts of securities fraud. The acts which formed the basis for the charges included a failure to amend the prospectus filed with the SEC prior to closing to reflect the true financial condition of Musikahn and a false statement in the prospectus indicating that a payment for consulting services was a purchase of computer software with an asset value of \$50,000.00.

In May 1985, the SEC subpoenaed all of Musikahn's books and records. Those records remained in the possession of the SEC; however, petitioner had access to those records from at least January 7, 1991 to the conclusion of these administrative hearings.

In May 1987, the Division began an audit of Jack Kahn for the period September 1, 1984 through November 19, 1986. As a result of that audit, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated July 11, 1988, assessing tax, penalty and interest as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>
November 30, 1984	\$ 137.50	\$ 34.38	\$ 73.24
August 31, 1985	52,942.89	15,882.87	21,210.62
November 30, 1985	20,359.28	6,107.78	7,316.24
February 28, 1986	96.53	28.96	30.86
November 19, 1986	1,293.39	362.15	266.01

A second Notice of Determination and Demand for Payment of Sales and Use Taxes Due, also dated July 11, 1988, was issued to petitioner for the period November 20, 1986 through August 31, 1987, assessing sales and use tax due for that period of \$18,435.71 plus penalty and interest as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>
November 30, 1986	\$ 748.79	\$ 209.66	\$ 154.00
February 28, 1987	320.04	80.01	54.57
May 31, 1987	9,758.62	2,146.90	1,323.80
August 31, 1987	7,608.26	1,445.57	774.71

The two notices were issued separately because the auditor mistakenly believed that the petition in bankruptcy was filed on or around November 20, 1986. The two notices were apparently intended to cover the pre-petition and post-petition periods.

Pursuant to a conciliation order dated February 8, 1991, the amount of tax assessed for the period September 1, 1984 through November 19, 1986 was reduced to \$21,886.76 plus penalty and interest. By the same order, the Division sustained the notice issued for the period November 20, 1986 through August 31, 1987.

As part of her audit, the auditor compared filed sales tax returns with Jack Kahn's sales tax accrual account. Based upon the difference between the amount of tax collected, as shown in the tax accrual account, and the amount of tax paid by Jack Kahn, the Division assessed sales tax as follows: \$20,359.28 for the period ending November 30, 1985; \$9,545.86 for the period ending May 31, 1987; and \$7,540.26 for the period ending August 31, 1987. An analysis of the corporation's purchase of fixed assets resulted in a determination of tax due in the amounts of \$137.50 for the period ending November 30, 1984; \$2,042.18 for the period ending November 30, 1986; \$320.04 for the period ending February 28, 1987; \$212.76 for the period ending May 31, 1987; and \$68.00 for the period ending August 31, 1987. In addition, tax was assessed for the period ending August 31, 1985, in the amount of \$52,942.89, based upon a transfer of fixed assets. This portion of the assessment was cancelled by the conciliation order. Tax assessed for the period ended February 28, 1986, in the amount of \$96.53, was based upon a single sale of \$1,170.00 which Jack Kahn claimed to be exempt but for which it produced no exemption certificate.

The record contains a number of documents which evidence petitioner's authority to act on behalf of Musikahn and of Jack Kahn. These documents are briefly described below.

On December 24, 1984, petitioner issued a memorandum to Mr. Wachs, Mr. Elkadi and another employee of Musikahn stating that they were not to release any previously issued checks or to draw new checks for Musikahn without petitioner's permission. The memorandum states:

"This instruction is necessary at this moment so that our cash flow can be managed according to the plans that I have made through this year-end period and into January."

According to petitioner, the policy stated was never effectuated because limitations on his time made it impractical for him to review all checks. He also stated that the policy was rescinded almost immediately after it was issued.

Petitioner signed a "Consent to Fixing of Tax Not Previously Determined and Assessed", dated March 12, 1985, agreeing on behalf of Jack Kahn to pay taxes in the amount of \$47,992.25 for the period June 1, 1981 through August 31, 1984.

Throughout the periods in issue, petitioner, acting on behalf of Jack Kahn, executed consents to extend the period of limitation for assessment of sales and use taxes. Consents signed by petitioner were dated: April 19, 1984, November 13, 1987, and March 4, 1988.

Petitioner had the authority to and did sign checks on behalf of Jack Kahn, including a check dated July 20, 1984 and checks dated March 20, 1987, June 20, 1987 and October 2, 1987.

During the assessment periods petitioner had the authority to and did hire and fire employees on behalf of Musikahn. He had total access to the books and records of Musikahn.

During the period December 1, 1984 through February 28, 1985, Arthur Wachs also had authority to and did sign checks on behalf of Musikahn. Mr. Wachs signed checks in payment of sales tax due for the month of January 1985 and for the period ending February 28, 1985.

At the first hearing, held on June 21, 1990, petitioner conceded that he was a person required to collect tax on behalf of Musikahn. On the second day of hearing, he withdrew this concession and asserted that, as a matter of law, he was not such a person during the periods covered by the assessments.

In the period leading up to the public offering (roughly, early 1984 through March 1985), petitioner was totally involved in duties and responsibilities connected with the public offering. He had little time for the day-to-day management of Musikahn and left the administrative and bookkeeping duties to Mr. Wachs. Petitioner maintains that he and Mr. Wachs had separate



areas of responsibility and that petitioner had no actual control over the financial and bookkeeping activities of Musikahn. He claims that, until his resignation, Mr. Wachs had sole discretion to determine which of Musikahn's creditors were paid and which were not. Petitioner suggested that Mr. Wachs exercised this discretion in a manner that was personally beneficial to Mr. Wachs and detrimental to Musikahn and petitioner. Petitioner testified that he was not even aware that Musikahn failed to pay sales taxes due for the periods preceding the filing of the bankruptcy petition until receiving a notice of tax due.

Petitioner testified that he was told by Mr. Wachs and by Donald Talbot, a certified public accountant who prepared financial statements for the public offering, that Musikahn had no outstanding tax liabilities at the time of the public offering. He stated that had he known at that time that there were taxes due for the period December 1, 1984 through February 28, 1985 he would have seen to it that they were paid before the closing of the public offering.

During the hearing, petitioner claimed that at least a portion of the assessed tax was paid. He introduced in evidence a copy of Musikahn's December 1984 sales tax return showing tax due of \$77,582.58, a check register showing a check issued to New York Sales Tax on January 21, 1985 in the amount of \$77,582.58, and an accountant's worksheet showing the calculation of the December sales tax. In his post-hearing brief, he did not pursue that argument, and there is no evidence in the record that the Division received the December payment.

### ***OPINION***

The Administrative Law Judge held that petitioner had been a person under a duty to collect and remit sales tax on behalf of Musikahn for the periods covered by the assessments. For the period prior to the filing of the petition for reorganization under Chapter 11 of the Bankruptcy Code, the Administrative Law Judge found that petitioner had control of Musikahn's finances and was not precluded from exercising his authority to determine which creditors would be paid. Thus, the Administrative Law Judge determined that petitioner was not relieved from personal liability under Tax Law §§ 1131(1) and 1133(a) for the taxes due

from Musikahn because he thought the corporation's tax compliance responsibilities were being handled by others. The Administrative Law Judge also held that petitioner was personally liable for taxes due from Musikahn after the filing of the Chapter 11 bankruptcy petition. The Administrative Law Judge found that during this period, petitioner was solely responsible for the financial affairs of Musikahn and, thus, remained responsible for Musikahn's compliance with the Tax Law. The Administrative Law Judge noted that most of the assessment arose from Musikahn's failure to pay over to the State the full amount of tax the corporation's records showed it had collected, and that petitioner had not explained this failure. Further, the Administrative Law Judge found that petitioner had full authority to direct GECC to pay sales taxes due from Musikahn, and that there was no evidence that GECC did not make such payments when instructed to do so by petitioner.

The Administrative Law Judge also held that petitioner's assertion that he acted in good faith was not sufficient to establish reasonable cause for the waiver of penalty and interest. Having found that petitioner exercised control over the financial affairs of Musikahn throughout the assessment periods, the Administrative Law Judge rejected as a basis for finding reasonable cause petitioner's assertions that he did not know that taxes were due and that he lacked control over tax payments. The Administrative Law Judge also found that since the evidence did not establish that petitioner was unable to obtain access to the corporation's books and records to use at the hearing, the subpoena of these records by the SEC or the transfer of records to the trustee in bankruptcy were not bases for a finding of reasonable cause.

On exception, petitioner asserts, as he did below, that he should not be held to be personally liable for the amounts due because: (1) for the amounts assessed for periods prior to the bankruptcy petition, he had prudently and responsibly relied on the assurances of others that taxes were paid; and (2) for the amounts assessed for periods after the bankruptcy petition, GECC had been responsible for payment of the taxes and petitioner had no control over the corporation's money or GECC. Petitioner argues that, for the same reasons, he has shown reasonable cause and an absence of willful neglect sufficient to abate the penalties and interest.

Further, petitioner asserts that penalties and interest from May 1985 through March 1991 should be abated because the records necessary for petitioner to present his case at hearing were not available to him during this period.

In response to the exception, the Division argues that the evidence established that petitioner was a responsible officer as he had control of and actively managed the financial affairs of the corporation, both before and after the bankruptcy petition was filed. The Division asserts that petitioner either knew or could have known of the corporation's tax liabilities and should have insured that the taxes were paid. For the amounts in the post-bankruptcy period, the Division notes that the bankruptcy order required GECC to release money when requested by the corporation for payment of the sales taxes; however, the taxes found to be due after the audit were never reported by the corporation and, thus, GECC could not have been responsible for failing to pay them.

We uphold the determination of the Administrative Law Judge for the reasons stated in that determination. Petitioner has not raised any issues on exception that were not raised below and adequately discussed by the Administrative Law Judge in her determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Gerard F. Binder is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Gerard F. Binder are denied; and

4. The notices of determination and demand for payment of sales and use taxes due dated October 27, 1986 and July 11, 1988, as modified by the Administrative Law Judge's determination, are sustained.

DATED: Troy, New York  
August 19, 1993

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner