

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**PHILIP J. PRIANTI** :

DECISION  
DTA NO. 818144

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, 1985 through May 31, 1985 :  
and December 1, 1985 through February 28, 1987. :

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Petitioner Philip J. Prianti, 374 Second Street, Jersey City, New Jersey 07302, filed an exception to the determination of the Administrative Law Judge issued on January 3, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Di Franco Gifts, Ltd. within the meaning and intent of Tax Law

§§ 1131(1) and 1133(a) and is, therefore, personally liable for payment of the taxes, penalties and interest due from the corporation.

***FINDINGS OF FACT***

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

For each of the sales tax quarters ended May 31, 1985, February 28, 1986, May 31, 1986, August 31, 1986 and November 30, 1986, Di Franco Gifts, Ltd. (“Di Franco”) filed sales and use tax returns without remitting the tax due. The return for the quarter ended May 31, 1985 bore the signature of Helen Sullivan, manager of Di Franco. The return for the quarter ended February 28, 1986 was unsigned. The other three returns bore a signature purporting to be that of Philip Prianti (“petitioner”). On the “Title” line of each of the returns, underneath the signature line, “President” was hand-printed. On the return signed by Helen Sullivan, the title “President” was crossed out; the title remained on each of the other returns including the unsigned return for the quarter ended February 28, 1986.

On May 20, 1987, the Division of Taxation (“Division”) issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner which assessed tax due in the amount of \$31,523.70, plus penalty and interest, for a total amount due of \$42,148.31 for the periods March 1, 1985 through May 31, 1985 and December 1, 1985 through November 30, 1986. The notice explained that petitioner was being held liable individually and as an officer of Di Franco for the taxes assessed pursuant to Tax Law §§ 1131(1) and 1133.

For the periods December 1, 1985 through November 30, 1986 (four sales tax quarters), the amounts of tax assessed were the amounts reported (but not remitted) by Di Franco on its

sales tax returns filed for each of these quarters. For the period March 1, 1985 through May 31, 1985, the amount of tax assessed (\$4,765.47) was less than the amount reported on Di Franco's return for that sales tax quarter (\$5,180.59); the discrepancy resulted from an offset of a personal income tax refund of petitioner in the amount of \$415.12 which the Division applied to the tax due for this quarter.

On May 20, 1987, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner which assessed tax in the amount of \$15,633.47, plus penalty and interest, for a total amount due of \$17,941.22 for the period December 1, 1986 through February 28, 1987. At the hearing, the Division's representative stated that "the Division of Taxation is not asserting its claim for the quarter ending February of 1987." Therefore, this notice is hereby canceled.

Di Franco's Certificate of Incorporation was filed with the State of New York Department of State on November 4, 1981. The incorporator was Ronald Webster.

In May 1982, petitioner and Ronald Webster entered into a written agreement ("the Agreement") which provided that Ronald Webster would be the recipient of 95 of the 100 shares of common stock of Di Franco; petitioner would own the remaining 5 shares (the Agreement provided petitioner with options to acquire up to 20 additional shares from Mr. Webster).

Pursuant to the Agreement, both Ronald Webster and petitioner were directors of Di Franco; Ronald Webster was Chairman of the Board and President while petitioner was Secretary/Treasurer. The name "Di Franco" was the maiden name of petitioner's mother.

Helen Sullivan, a manager whose duties included preparation of the payroll, worked for Di Franco from its inception. She considered both Ronald Webster and petitioner to be her bosses.

Petitioner had the authority to hire and fire employees and also signed checks on behalf of Di Franco.

Thomas Rufino was a salesman for Di Franco during the years 1985 until 1987 when the store closed. He considered both Ronald Webster and petitioner to be his bosses.

Ronald Webster was an executive vice president of an import company and, therefore, worked at Di Franco at night and on weekends. Mr. Webster provided all of the money to start the business and petitioner was to devote his full-time attention to running the business.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that pursuant to Tax Law § 1133(a), every person required to collect sales and use tax is personally liable for the amount of tax imposed, collected or required to be collected. He also pointed out that Tax Law former § 1131(1) defined “persons required to collect tax” to include any officer or employee of a corporation who, as such officer or employee, is “under a duty to act for such corporation in complying with any requirement of [Article 28].”

The Administrative Law Judge cited case law which establishes that the mere holding of corporate office does not, per se, impose sales tax liability upon an officeholder. Rather, a determination of whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case. The factors to be considered include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation.

The Administrative Law Judge concluded that petitioner was a director, officer and shareholder of Di Franco and was involved in the day-to-day management of the business and

had the ability to hire and fire employees and to sign checks. Rejecting petitioner's argument that Ronald Webster, as president and majority shareholder, was responsible for the sales and use tax liability of the business, the Administrative Law Judge noted that more than one person can be held liable for sales and use tax as a responsible officer. Thus, the Administrative Law Judge concluded that even if Ronald Webster could be found to have been a responsible officer of Di Franco, that fact would not relieve petitioner of his responsibility as well.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that he collected the appropriate sales tax, remitted it to the corporate account for payment to New York State and was defrauded by the primary shareholder that said sums had been properly remitted. He alleges that the collected sales tax was not in his control or custody.

In opposition, the Division argues that the Administrative Law Judge correctly determined that petitioner was a person required to collect sales tax for Di Franco and who is, therefore, liable for the tax, penalty and interest owed by that corporation.

### ***OPINION***

Petitioner does not take exception to any of the findings of fact or conclusions of law of the Administrative Law Judge. Petitioner's only argument on exception is that petitioner collected the appropriate sales tax, remitted it to the corporate account for payment to New York State and was defrauded by the primary shareholder. Petitioner raises this factual issue for the first time on exception. It was not presented in either his petition or at the hearing before the Administrative Law Judge. We have consistently held that new legal issues may be raised on exception (*Matter of Chuckrow*, Tax Appeals Tribunal, July 1, 1993). However, the raising of

factual issues after the closing of the record is not allowed as it “deprives the party with the burden to prove the disputed fact of the opportunity to submit evidence” (*Matter of Howard Enters.*, Tax Appeals Tribunal, August 4, 1994). As a result, petitioner cannot raise this issue for the first time on exception before the Tax Appeals Tribunal.

As a result, petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge’s determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Philip J. Prianti is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Philip J. Prianti is granted to the extent indicated in Finding of Fact “3” of the Administrative Law Judge’s determination but otherwise is denied;
4. The Notice of Determination for the period December 1, 1986 through February 28, 1987 is hereby canceled; and

5. The Notices of Determination for the periods March 1, 1985 through May 31, 1985 and for December 1, 1985 through November 30, 1986 are sustained.

DATED: Troy, New York  
October 31, 2002

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner