

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JOHN KYEES</b>	:	
for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1997 through August 31, 2000.	:	DETERMINATION DTA NO. 819341

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Petitioner, John Kyees, 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 September 1, 1997 through August 31, 2000.

A hearing was begun before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 9, 2004 at 10:30 A.M., and concluded on January 16, 2004 at 2:00 P.M. at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York. All briefs were submitted by July 15, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by Walter P. Stasiuk, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Cynthia E. McDonough, Esq., and Susan Hutchinson, Esq., of counsel).

***ISSUES***

I. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of TCS Acquisition Corp. d/b/a The Custom Shop.

II. Whether the stipulation at hearing was binding on the parties.

III. Whether certain of the assessments in issue were invalid because they lacked a rational basis.

### ***FINDINGS OF FACT***

In his brief filed on March 19, 2004, petitioner submitted 45 proposed findings of fact, 6 of which have been incorporated substantially into the following Findings of Fact. The remaining proposed findings are rejected for the following reasons:

a. Proposed findings 5, 6, 14, 15, 22, 24, 25, 29, 31, 35, 36, 37, 40, 41, 42, 44 and 45, are deemed immaterial and irrelevant;

b. Proposed findings 8, 10, 11, 12, 13, 18, 19, 20, 21, 23, 26, 27, 28, 30, 32, 33, 34, 38 and 39, are rejected as not being supported by, or accurately reflecting, the record herein; and

c. Proposed findings 2, 3 and 43, are rejected as conclusory in nature.

1. On September 10, 2001, the Division of Taxation issued to petitioner four notices of determination as a person liable for the collection and payment of sales and use taxes on behalf of TCS Acquisition Corp. ("TCS"). The notices set forth the following information:

Notice Number	Period Ended	Tax	Interest	Penalty	Total
L-020077394-7	11-30-99	\$2,057.40	\$322.59	\$0.00	\$2,379.99
L-020077392-9	2-29-00	939.29	126.06	0.00	1,065.35
L-020077391-1	8-31-00	445.57	392.35	3,347.90	4,185.82
L-020077393-8	11-30-97	2,996.41	1,072.30	0.00	4,068.71
L-020077393-8	2-28-98	5,169.71	1,695.99	0.00	6,865.70
L-020077393-8	5-31-98	3,630.30	1,093.31	0.00	4,723.61
Notice Number	Period Ended	Tax	Interest	Penalty	Total

L-020077393-8	8-31-98	4,980.86	1,370.68	0.00	6,351.54
L-020077393-8	11-30-98	7,624.50	1,906.22	0.00	9,530.72
L-020077393-8	2-28-99	6,230.35	1,422.09	0.00	7,652.44
L-020077393-8	5-31-99	4,024.80	821.46	0.00	4,846.26
L-020077393-8	8-31-99	4,091.00	736.65	0.00	4,827.65
L-020077393-8	11-30-99	3,165.46	496.23	0.00	3,661.69
L-020077393-8	2-29-00	20,613.67	2,765.78	0.00	23,379.45

2. At hearing, the Division, consistent with the stipulation it made with petitioner, withdrew its assertion of taxes due for the quarters ended November 30, 1997, February 28, 1998 and May 31, 1998, as set forth on notice number L-020077393-8, because the assessment of taxes for those periods was barred by the statute of limitations. In addition, the Division cancelled \$17,912.78 of the tax asserted for the quarter ended February 29, 2000 which was attributable to the bulk sale of the assets of TCS as part of its bankruptcy proceeding. The Division continues to assert tax due of \$2,700.89 for that quarter.

The Division withdrew its assertion of penalty in the sum of \$3,347.90 as set forth on notice number L-020077391-1, such that only the tax of \$445.57 and interest remain due thereon for the quarter ended August 31, 2000.

3. Three of the notices of determination were generated by the Division as a result of information taken from TCS's quarterly sales and use tax returns. Two of the notices, L-020077391-1 and L-020077392-9, demonstrated that the Division of Taxation accepted the returns as filed and merely assessed the unremitted amount plus interest. The third notice, L-020077394-7, demonstrated that the Division of Taxation disagreed with the amount of tax due stated on the return, but without any definitive explanation found \$95.76 more in tax due. The Division's representative and auditor believed the additional tax was a "jurisdictional"

problem, where the taxpayer applied the wrong tax rate for a specific county and actually owed more tax than reported. The remaining tax assessed, \$1,961.64, was reported by TCS but not remitted.

Also, two of these notices were issued for the quarters ended November 30, 1999 and February 29, 2000, both of which appeared in the Division's notice of determination number L-020077393-8. However, there was no overlap in the assessments because the taxes asserted pursuant to the audit were in addition to those reported by TCS on its returns.

4. A sales tax examination questionnaire was mailed to TCS in May or June 1999, seeking information about the company and requesting the name of a contact person. TCS returned the questionnaire on June 25, 1999, signed by Mariann Cilurso, Assistant Controller, who was designated the contact person. In the questionnaire, Ms. Cilurso stated that petitioner was a principal officer of TCS.

On or about March 2, 2000, the Division of Taxation sent TCS an appointment letter which requested all books and records pertaining to TCS's sales and use tax liability for the period September 1, 1997 through February 29, 2000. After several field visits to the New Jersey headquarters and a second request for information and documentation, the records produced by TCS were deemed to be complete, and the auditor determined that a test period audit for sales was the most efficient way to determine if TCS was in compliance. A detailed audit of expense and asset purchases was performed. On June 21, 2000, TCS and the Division entered into an agreement whereby the Division was permitted to use a test period audit method to determine TCS's tax liability on sales for the period September 1, 1997 through February 29, 2000.

5. The Division and TCS agreed to use the test months of April 1998, April 1999 and October 1999 to examine the adequacy of the sales records. Months with tax-free weeks were specifically omitted to avoid common errors associated with those weeks. Upon a review of the sales receipts for the test, the auditor found a substantial number of sales where no tax had been collected, yielding an error rate of 0.1666 percent. This error rate was applied to total New York sales for each quarter in the audit period to arrive at additional tax due. Additional tax due on these sales for the period September 1, 1997 through February 29, 2000 was \$29,225.63.

The auditor believed that many of the invoices on which sales tax was not charged were sales to employees. This opinion was based upon information received from the assistant controller, Mariann Cilurso.

A detailed review of all asset purchases for the same period yielded \$7,045.34 in additional tax, while an inspection of all invoices of expense purchases yielded \$8,343.31 in additional tax due.

The total additional tax due for the audit period September 1, 1997 through February 29, 2000 was \$44,614.28. However, since the Division canceled the tax due for the first three quarters and the amount assessed on the bulk sale, the amount remaining in issue was \$32,817.86.

6. TCS was engaged in the retail sale of men's shirts, suits and accessories through 50 to 60 company-owned stores located in about 30 states, with 8 in New York. Most of its shirts were custom manufactured by an affiliated company in New Jersey, where TCS maintained its administrative offices. Although its suits were custom made, they were manufactured by third parties.

7. At all relevant periods, TCS was a wholly-owned subsidiary of HC Holdings Corp. (“Holdings”), an Ohio-based company that acquired TCS and its manufacturing affiliate during 1997. Holdings did not have any accounting or tax personnel, nor did it have any day-to-day operational responsibilities, but it did oversee and provide management support services to TCS, its manufacturing affiliate and another wholly-owned operating company, Huntington Clothiers, Inc. (“Huntington”).

8. TCS and affiliated companies filed a petition in bankruptcy on January 3, 2000 in the District of Delaware. The Bankruptcy Court approved the sale of substantially all the assets of TCS on February 10, 2000, and the closing took place on an unspecified date later that same month. TCS ceased operations after the sale in bankruptcy, but sales tax returns continued to be filed with its taxpayer identification number.

9. Holdings had two principal employees: Michael Stern, chairman and chief executive officer, and petitioner, the chief financial officer. Petitioner was hired by Holdings in 1997, about four months after Holdings acquired TCS, and departed on an unspecified date in late February 2000. Petitioner worked from Huntington’s offices in Columbus, Ohio and traveled to TCS to provide management services throughout his tenure with the company.

10. Holdings was owned by multiple venture capital groups that appointed Holdings’ board of directors. In 1999, when TCS was having severe financial difficulties, the board brought in an external workout specialist, William Loebbaka, who became the acting chief executive officer of TCS, replacing Chris Fiore. Until early 1999, the “ultimate decisions” at TCS were made by its president, although certain major decisions required the approval of Stern and the board of directors of Holdings. As the financial affairs of TCS deteriorated in 1999,

Loebbaka was brought in to salvage the company. Loebbaka made all major decisions at TCS including payment of bills.

11. TCS was operated by a chief executive officer, Chris Fiore, for most of the period in issue, and employed various vice presidents in charge of store operations, general merchandise, manufacturing, and a comptroller with assistants. For most of the audit period, TCS had no controller and many of the duties of the controller fell to Charles Soranno.<sup>1</sup> However, he did not assume the title. Mr. Soranno reported directly to petitioner until leaving the company in early 1999. The positions of controller and assistant controller for retail remained vacant.

Petitioner spent a good deal of his time at the TCS headquarters in New Jersey during 1997, 1998 and 1999, and even more in the latter half of 1999. Mr. Soranno stated that petitioner was at the New Jersey office three or four days a week, equating to 60 to 80 percent of the work week, indicating petitioner's close relationship with TCS.

12. The controller's duties included responsibility for cash management and internal control structures. The controller's office had direct responsibility for retail operations and manufacturing as well as the tax and accounting functions. Mr. Soranno and an assistant, Mariann Cilurso, filled these roles for TCS during the relevant periods herein.

Two other employees, Pam Elchin and Mary Fedele, prepared the tax returns and administered the accounts payable and receivable. Mr. Soranno, Ms. Elchin and Ms. Cilurso signed the sales tax returns.

13. Because petitioner had no tax background, he relied heavily upon Soranno, Cilurso and their staff to provide him with the data he needed to manage the financial affairs of TCS.

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<sup>1</sup>TCS's controller, Mitch Spiegel left the company shortly after petitioner was hired.

Each month he was provided with profit and loss statements (“P&L’s”), summary P&L’s, balance sheets and statements of cash flow. These reports allowed petitioner to spot “red flags” in all financial areas which might require further analysis. Sales taxes and tax on expense purchases and assets were areas that could have generated “red flags.”

14. Although petitioner did not have a background in tax or accounting, he had substantial experience in management, especially in the areas of administration, finance and planning, and he provided services in these areas to TCS and Huntington during the audit period. Petitioner’s education was in finance and his job experience was in finance and retail management. Petitioner prepared reports for banks from which the companies borrowed as well as planning reports requested by the board of directors and investors. He also assisted TCS in identifying opportunities and evaluating expenses and gross margin.

Although Mr. Soranno and Ms. Cilurso generally approved expense purchases, petitioner was consulted when the purchase was deemed significant. In addition, petitioner was consulted on the hiring and firing of employees in the controller’s department, although it occurred only twice during Mr. Soranno’s tenure, which ended in early 1999.

15. Petitioner’s duties extended beyond these, however. Petitioner worked very closely with the accounting and tax staff in the controller’s office and they reported to him. Petitioner managed and supervised the department and had an oversight role with regard to their work product. From a corporate perspective, petitioner was the equivalent of the treasurer of the corporation.



The controller's department handled notices and bills received from taxing authorities without alerting or providing a summary to any executive of any of the related companies, including petitioner, unless it was financially material.

16. Petitioner received a six-figure salary from Holdings, and never had an equity or debt interest in any of the related companies. Although an officer of TCS, holding titles of secretary and vice president, petitioner was not a member of the board of directors of Holdings or TCS. Petitioner was listed as a secretary of TCS on the questionnaire submitted by his subordinate, Mariann Cilurso, and on a signature card from EAB Bank. He signed as a vice president on the bankruptcy petition filed by TCS and on a TCS board resolution in January 2000.

17. TCS utilized a premier sales tax compliance software package known as "Vertex." It was used by retailers to assure compliance with sales tax obligations in every state in which business was conducted. Various personnel were called upon to comment on the purchase of this system and an external technology expert was consulted as well. Petitioner studied the purchase from a "return on investment" perspective and found that it would benefit the business. Despite its state-of-the-art technology, the Vertex system was not able to prevent the failure to collect sales tax on a substantial number of New York retail sales during the audit period and did not alert management to the sales on which no tax was collected.

Vertex was part of a "point of sale" sales reporting system utilized by TCS. This system records sales as they occur at cash registers in all retail stores and then reports daily totals to headquarters by the next morning, allowing management to have immediate sales data for informational and decision-making purposes.

18. Petitioner was a signatory on at least one TCS operating account and probably several. Checks issued by TCS for payment of bills, taxes, payroll and other items required two signatures. Petitioner's signature was generated by machine, i.e., a facsimile signature, and applied under his authority and with his acquiescence whenever necessary. However, petitioner was not notified when checks were issued with his signature and received no report after the fact.

19. When TCS began to suffer financially in mid-1999, petitioner was asked for input on proposed payments, with final approval resting with Mr. Loebbaka.

20. Petitioner never signed contracts on behalf of TCS; that function was handled by the chief executive officer and specific department heads.

21. As mentioned above, petitioner reviewed balance sheets, P&L's and cash flow reports prepared for him and other executives by his subordinates in the controller's department on a monthly basis. Through these reports he monitored whether TCS was operating according to its budget and business plan, looked for trends and opportunities and also problems in need of a remedy.

22. Petitioner specifically looked for "red flags" in the area of taxes. For example, if personnel costs increased without a corresponding increase in payroll taxes, he would seek an explanation from the human resources department. Likewise, changes in retail sales without a corresponding change in sales tax collection reflected either a shift to sales delivered in different taxing jurisdictions, which he discussed with the head of retail operations, or a change in the collection of taxes, which he discussed with the controller's department. Petitioner failed to spot any issues or problems with the proper collection of sales tax at TCS during his tenure.

23. Petitioner recalled three instances where he made a specific inquiry into sales tax compliance: upon the hiring of Mr. Loebbaka; during a pre-bankruptcy acquisition due diligence investigation; and during preparation of the bankruptcy petition and schedules. In each of these instances he was advised by his subordinates that there were no outstanding liabilities and that TCS was in compliance with the Tax Law.

24. The Division of Taxation did not file a proof of claim for the taxes found due from TCS for the period in issue against the bankrupt estate prior to the bar date of December 29, 2000.

### ***CONCLUSIONS OF LAW***

A. The first issue which must be resolved is whether the stipulation entered into by the parties on the record at the January 9, 2004 hearing was binding on the parties. The Division of Taxation raised the issue in its responding brief, over six months after the stipulation was entered into on the record at hearing. It argued that the tax found due on the bulk sale in the last quarter of the audit was merely the sales tax due on the sale of tangible personal property and should not have been cancelled by the Division's attorney at hearing. It is determined that the Division is bound by the stipulation at hearing.

CPLR 2104 mentions stipulations made between counsel in open court but does not specifically address them. The practice has traditionally been used to streamline proceedings and avoid delay and is binding on the parties when an agreement is read into the record in open court. (*See, Sontag v. Sontag*, 114 AD2d 892, 495 NYS2d 65, *appeal dismissed* 66 NY2d 554, 498 NYS2d 133.)

In *Errico v. Davidoff* (178 Misc 2d 378, 679 NYS2d 530), the Court reviewed the importance of stipulations in open court. It said:

Stipulations of settlement are favored by the courts. Only where there is sufficient cause to invalidate a contract will a party be relieved from the consequences of a stipulation made during litigation. [Citation omitted.] Negotiated compromises avoid potentially costly, time-consuming litigation and preserve scarce judicial resources. There is also a societal benefit in recognizing the autonomy of parties to shape their own solutions rather than having one judicially imposed. [Citation omitted.] (*Id.*, 679 NYS2d at 532.)

On page 8 of the transcript to the first hearing, the Division's representative, Ms. McDonough, stated:

And, Your Honor, I'd like to make a stipulation on the record that the parties have already discussed and agreed to.

The terms are more completely set forth at Finding of Fact "2".

The Division claims it relied on the wrong section of its own regulations and requests permission to rescind that part of the stipulation regarding the bulk sale. However, ignorance of the law is not sufficient cause to invalidate a contract and, therefore, does not provide a basis for this forum to modify the terms of the agreement solemnly entered into by the parties at hearing. Further, the modification requested by the Division at this late juncture would be highly prejudicial to petitioner, who relied on the stipulation in choosing the evidence it submitted, in formulating questions for witnesses and in preparing its legal briefs. The failure to notify petitioner immediately of the mistake amounted to a waiver of its objection. (*Wholesale Service Supply Corp. v. State*, 201 Misc 56, 103 NYS2d 820.)

B. The next issue presented for resolution is whether certain assessments issued to petitioner lacked a rational basis. Petitioner argues that the assessments generated as a response

to the sales tax returns filed by TCS (or under its taxpayer identification number) were duplicative of the tax assessed as a result of the field audit and lacked a stated rational basis.

If a notice has no rational basis it must be set aside (*Matter of Donahue v. Chu*, 104 AD2d 523, 479 NYS2d 889; *Matter of Rosenthal v. State Tax Commission*, 102 AD2d 325, 477 NYS2d 767). However, the Tax Appeals Tribunal refined this concept in *Matter of Atlantic and Hudson Limited Partnership* (Tax Appeals Tribunal, January 30, 1992). Therein, the Tribunal stated:

Although a determination of tax must have a rational basis in order to be sustained upon review, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment. Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear: on the face of the audit as described by the Division through testimony or documentation; from factors underlying the audit which are developed by the petitioner at hearing; or in the inability of the Division to identify the bases of the audit methodology in response to questions posed at the hearing. However, where, as here, petitioner has failed to make any inquiry into the audit method or calculation, the presumption of correctness raised by the issuance of the assessment provides the rational basis for the assessment. To hold otherwise would be in irreconcilable conflict with the principles that the Division does not have the burden to demonstrate the propriety of its assessment and that petitioner has a heavy burden to prove the assessment erroneous. (Citations omitted.)

In the instant matter, it was explained that the three notices issued by the Division, L-020077391-1, L-020077392-9 and L-020077394-7, were generated based upon information set forth by TCS on the quarterly tax returns. The two former assessments indicate on their face that TCS failed to remit the tax stated as due on the return and the latter assessed \$1,961.64 which TCS failed to remit and \$95.76 in what was characterized by the Division as a jurisdictional adjustment. Other than contending that the origin of the tax assessed was unknown, petitioner did not seriously challenge the propriety of the assessments. Therefore, the notices L-

020077392-9 and L-020077394-7 are valid and, if found to be responsible for the taxes of TCS, petitioner will be liable for the taxes assessed thereon.

However, petitioner is not liable for the taxes assessed by notice number L-020077391-1 because petitioner terminated his employment and officer status as of the end of February 2000 and is not liable for any taxes due from TCS thereafter.

C. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation . . . who as such officer, director or employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [article 28]" (Tax Law § 1131[1]).

D. The determination that an individual is a responsible person depends upon the particular facts of each case (*Stacy v. State*, 82 Misc 2d 181, 183, 368 NYS2d 448, 451; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, *inter alia*, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (*see*, 20 NYCRR 526.11[b][2]; *Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NYS2d 822, 513 NYS2d 1027; *Matter of Rosenblatt v. State Tax Commn.*, 114 AD2d 127, 498 NYS2d 529, *revd in part on dissenting opn below* 68 NY2d 775, 506 NYS2d 675).

E. In *Matter of Vogel v. Department of Taxation and Finance* (98 Misc 2d 222, 413 NYS2d 862), the court stated:

The general language of section 1131 (subd. 1), defining persons who are required to collect taxes, includes only those officers of a corporation who are 'under a duty to act for such corporation.' The resolution of whether an officer is under a duty to act, then, turns on a factual determination.

Indicia of this duty would include factors which directly relate to compliance with Article 28, such as the officer's day-to-day responsibilities and involvement, with the financial affairs and management of the corporation, his knowledge of such matters, the officer's duties and functions outlined in the certificate of incorporation and the bylaws, and the preparation and filing of sales tax forms and returns (see, *Chevlowe v. Koerner*, 95 Misc 2d 388, 391-392, 407 NYS2d 427, 429-430, *supra*). Furthermore, in situations involving closely held corporations, as in the present case, an officer's knowledge of the corporate affairs and his benefits received from corporate profits would be extremely important considerations. (Citations omitted.)

Indeed, the Division's own regulations define a person under a duty to act on behalf of a corporation as follows:

[g]enerally, 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].)

F. Given the facts presented in this case, it is determined that petitioner was a person required to collect sales and use taxes on behalf of TCS. His employee and officer status brought with it the duty to act on behalf of the corporation in complying with the requirements of Article 28 of the Tax Law. Although petitioner has attempted to minimize his involvement in the operations of TCS, the record indicated that this was not the case.

Petitioner was one of only two principal employees of Holdings, the parent of TCS, highlighting his importance to Holdings and TCS both as a manager and a member of the strategic decision-making team. Indeed, petitioner's own testimony underscored his belief that his value to the corporations was his ability to identify opportunities, advise the various chief

executives on investments and gross margin and producing planning reports for the chief executives, board of directors and investors, as well as financial institutions with which TCS did business.

It is true that petitioner did not have the responsibility for keeping the books and filing tax returns, but the controller's department did, and he was directly responsible for the operation of that department and its work products, which formed the basis for the projections and planning advice he gave to the chief executives, the board of directors, investors and financial institutions. Indeed, the employees of the controller's department all reported to him, including those responsible for the preparation, signing and filing of the sales and use tax returns: Mariann Cilurso, Charles Soranno, Pam Elchin, and Mary Fedelev. Although his subordinates may have prepared and signed the sales tax returns and maintained the books and records of TCS, petitioner's oversight responsibilities, his duty to spot the "red flags," made him directly responsible for the proper collection and payment of the sales and use taxes due. One cannot delegate this responsibility and escape liability. "Corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge." (*Ragonesi v. State Tax Commission*, 88 AD2d 707, 451 NYS2d 301.)

For the same reason, petitioner's argument that the Vertex system, which he investigated and approved for purchase, was responsible for the failure to collect the proper tax on retail sales was in error. Once again, responsibility for compliance with the sales tax law was ultimately his, and delegation of the duty to monitor collection could not be shifted to a software program. The



fact that he did not discern the failure to collect and pay the tax due on all retail sales in New York was his responsibility.

G. Further, petitioner fits the *Vogel* definition of a responsible person. Unchallenged documentary evidence indicated he was secretary and vice president of the TCS. He was an authorized signatory on at least one TCS bank account, and he permitted his facsimile signature to be used to sign and countersign checks, once again delegating his authority, but not his responsibility, this time to issue checks on behalf of the corporation. He was responsible for the generation of financial reports by TCS, which his staff prepared for him and which he reviewed and interpreted for the chief executives and boards of directors. In at least two instances, petitioner was directly involved in hiring decisions, revealing that he had authority to do so even if he did not exercise it. For these substantial and critical duties he received a six-figure salary.

His management and supervision of the controller's department placed him at the top of the chain of command for compliance with the Tax Law of New York. The record reveals no other individual in Holdings or TCS responsible for tax compliance oversight. Quite simply, the buck stopped at petitioner's desk.

In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), it was decided that a person's responsibility should be determined by 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. From the facts in this case, petitioner's authority and control over the preparation and dissemination of financial statements, oversight of the controller's department and supervision of the employees who had the responsibility for the preparation and filing of tax

returns and the proper collection of tax on retail sales and expense and asset purchases were more than sufficient to qualify him as a responsible person.

Petitioner mistakenly cited the determination of an administrative law judge, *Matter of Russack* (April 13, 1995), which is specifically prohibited by Tax Law § 2010(5) and will not be considered herein. Petitioner's reliance on *Matter of Russack* (Tax Appeals Tribunal, February 8, 1996) is misplaced. In that matter, Mr. Russack was held not liable for sales and use taxes due from a company which he wholly owned. In addition, Mr. Russack was the chairman of the board of directors. Like Mr. Kyees, Mr. Russack relied on people he managed and supervised. However, in *Russack* the treasurer and president intentionally falsified business records and consistently lied to Mr. Russack about the corporation's sales tax liability and bad financial situation. This conspiracy to deceive the chairman of the board was the critical finding on which the *Russack* case was decided, and also the reason it is distinguishable from the instant matter. Mr. Kyees was not deceived by his staff in the controller's department, rather, he was provided with accurate records with errors he failed to note.

Petitioner, citing *Vogel*, argues that his liability is not absolute and that he prudently relied on the reports he received from his subordinates and that as a secretary of TCS he should not be an insurer of the corporation. For the reasons cited above, it is determined that petitioner was responsible for the controller's department, especially since there was no controller for almost all of petitioner's tenure at the company. Mr. Soranno, Ms. Cilurso and the entire staff viewed petitioner as their boss, and their work product was directly subject to his review. Further, he did examine the financial reports generated by the department, including looking for "red flags" in the area of taxes. The fact that he chose to not to examine source documentation was a

product of not having in place an adequate system for finding problems, i.e., failure to collect tax on routine retail sales, purchases of assets and expense purchases. Petitioner's contention that no one could have known about these errors is not a valid basis for cancelling the assessment against him.

H. Petitioner argues that the assessments should be cancelled because the Division failed to file a timely claim against TCS in bankruptcy for the taxes in issue. In failing to file a claim, petitioner contends that the Division failed to exercise due care and lost an opportunity to recover all the taxes due from the proper party.

In *Matter of Geiger* (Tax Appeals Tribunal, March 8, 2001), the Division failed to file a proof of claim against a corporation for which it was determined Mr. Geiger was a responsible officer. The Division had a right to file a claim but failed to do so for unknown reasons. In *Geiger*, the Tribunal rejected petitioner's argument that the Division should be estopped from collecting the sales tax from him because to do so would result in a manifest injustice. The Tribunal found no legal authority which imposed a duty on the Division to file a proof of claim.

The facts in the instant matter are no different from those in *Geiger* and petitioner's contention, grounded in equity, must fail for the same reasons.

I. The petition of John Kyees is granted consistent with Conclusions of Law "A" and "B", but in all other respects the petition is denied, and the four notices of determination, dated September 10, 2001, as specifically modified herein, are sustained.

DATED: Troy, New York  
January 13, 2005

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE