

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ROY HOVLAND</b>	:	SMALL CLAIMS DETERMINATION DTA NO. 820937
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods September 1, 1999 to November 30, 2000 and March 1, 2001 to December 31, 2002.	:	

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Petitioner, Roy Hovland, 8 Dale Road, Stonybrook, New York 11790, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 1999 to November 30, 2000 and March 1, 2001 to December 31, 2002.

A small claims hearing was held before James Hofer, Presiding Officer, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York, on July 26, 2006 at 9:15 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Hani Elbayer and Phyllis Jacobson).

The final brief in this matter was due by February 9, 2007, and it is this date that commences the three-month period for the issuance of this small claims determination.

***ISSUES***

I. Whether the audit method employed by the Division of Taxation to determine additional sales and use taxes due from Professional Kitchen Designs, Inc., was reasonable and, if so, whether petitioner has shown error in either the audit method or result.

II. Whether petitioner, who is admittedly a person responsible for payment of any sales and use taxes for all periods prior to September 1, 2001, is liable for payment of only one-half of any taxes and interest determined to be due, with the remaining one-half payment the responsibility of the other officer of Professional Kitchen Designs, Inc.

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

#### ***BACKGROUND***

1. In March 1988, petitioner, Roy Hovland, formed Professional Kitchen Designs, a business operated as a sole proprietorship which was engaged in the design and remodeling of kitchens and bathrooms for residential customers only. Petitioner did the design work and used various subcontractors to perform the actual renovations.

2. In late 1989, petitioner, due to illness, ceased all business operations. Petitioner ultimately had 12 operations with many complications. In 1995, petitioner reopened Professional Kitchen Designs, operating from an office maintained in his personal residence.

3. In September 1997, petitioner met Thomas Serravillo, a subcontractor doing tile work on a bathroom remodel petitioner had designed. Petitioner eventually had Mr. Serravillo subcontracting on all of his kitchen and bathroom remodeling jobs.

4. On September 24, 1999, petitioner ceased doing business as a sole proprietor, and a domestic business corporation, Professional Kitchen Designs, Inc. ("PKD"), was formed. Petitioner was president and treasurer of PKD and Mr. Serravillo was vice-president and secretary of the corporation. PKD had two shareholders, petitioner and Thomas Serravillo, and each owned 10 shares of common stock in the corporation.

5. PKD operated out of the office in petitioner's house for approximately one year, until September 2000, when it relocated to rented space in Ronkonkoma, New York. Petitioner's relationship with Thomas Serravillo began to deteriorate almost from the inception of PKD and it continued to decline at a rapid pace. By August 31, 2001, petitioner's relationship with Mr. Serravillo was so strained that he left the business premises and performed his design work from home, e-mailing the designs to PKD's office. Petitioner submitted a formal resignation to PKD on March 26, 2002. PKD ceased all business operations on or about December 31, 2002.

6. On July 22, 2002, petitioner initiated a lawsuit against Thomas Serravillo, seeking a total judgement in excess of 4.5 million dollars. Mr. Serravillo filed a Verified Amended Answer with Counterclaims, seeking dismissal of petitioner's entire complaint and, if petitioner was successful in the recovery of any funds, the Amended Answer alternatively claimed that Mr. Serravillo was entitled to a judgement against petitioner in a sum in excess of 4.5 million dollars. The positions taken by each party in the lawsuit and counterclaim regarding how the parties separated, who was responsible for the separation and ultimately the demise of PKD are vastly different.

7. In the midst of litigation, Mr. Serravillo filed for bankruptcy in the Eastern District of New York. Petitioner participated in the bankruptcy proceeding for the purpose of contesting certain discharges. Petitioner ultimately dropped the lawsuit as the result of mounting legal fees and the fact that even if he was successful, there was little likelihood of collecting on any judgement that may have been awarded.

### ***THE AUDIT***

8. By letter dated December 18, 2003 and mailed to PKD at its Ronkonkoma, New York address, the Division of Taxation ("Division") advised PKD that its sales and use tax records for

the period September 1, 1999 through November 30, 2003 were scheduled for an audit to be held at its office on January 5, 2004. The letter contained a detailed list of all records needed for audit and also advised that any of the requested records “may be submitted in electronic format, if available, and this may facilitate the audit process.” The December 18, 2003 appointment letter was returned indicating that PKD had moved. An investigator from the Division visited the Ronkonkoma, New York address on December 31, 2003 and learned that PKD had vacated the premises when it ceased all business operations effective December 31, 2002.

9. On January 23, 2004, the Division mailed new appointment letters to both petitioner and Mr. Serravillo, at their respective home addresses, requesting that they produce all of the books and records of PKD for audit on February 6, 2004. Neither petitioner nor Mr. Serravillo appeared at the scheduled February 6, 2004 appointment nor were any of PKD’s books and records produced for audit. Petitioner, by letter dated February 8, 2004, advised the Division that he had left PKD effective September 1, 2001 and that Mr. Serravillo was in possession of the company records.

10. On February 13, 2004, the Division issued a Notice of Determination to PKD for the quarter ending February 28, 2001, asserting that \$9,070.92 of sales tax was due, together with penalty and interest. Since PKD failed to present any books and records for audit, the additional tax due was computed based on a quarterly gross sales figure of \$109,950.50, which figure was computed using gross sales as reported on PKD’s 2000 Federal income tax return. Since there was no evidence to support nontaxable sales, the Division deemed the entire \$109,950.50 amount as subject to sales tax. On March 8, 2004, the Division issued separate notices of determination to both petitioner and Thomas Serravillo holding them each personally liable as a

responsible officer of PKD for payment of the tax, penalty and interest allegedly due from PKD for the quarter ending February 28, 2001.

11. On April 16, 2004, petitioner e-mailed to the Division's auditor two Excel files entitled "PKD Profit & Loss as of 2-20-02.xls" and "PKD Customer Contacts 2-20-02.xls." By letter dated April 21, 2004, the Division's auditor advised petitioner that he had processed both files and that the data contained in the PKD Customer Contacts 2-20-02.xls file was of no significance to the sales tax audit. The letter further stated that "[A]s a result of processing the 1<sup>st</sup> file [PKD Profit & Loss as of 2-20-02.xls], I was able to generate the following 2 reports:

1 - Transcript and reconciliation of sales covering the period included in the file (1/1/2000 - 2/28/2002).

2 - Transcript of selected expense accounts covering the period included in the file (1/1/2000 - 2/28/2002)."

The April 21, 2004 letter asked petitioner to provide detailed source documents, such as invoices, bills, contracts, vouchers, purchase orders and any documents, to substantiate nontaxable sales and expense transactions.

12. Petitioner was unable to provide any of the additional documents requested by the Division, claiming that his former partner had control of all source documents, that said former partner had left the records at PKD's Ronkonkoma, New York address when it ceased operations and that the landlord allegedly discarded all of PKD's record left on the premises.

13. Since it appeared that petitioner would be unable to produce any additional documentary evidence, the Division computed sales using the PKD Profit & Loss as of 2-20-02.xls file. The following table reflects sales as determined by the Division on audit and the tax due on said sales:

<b>PERIOD</b>	<b>GROSS SALES</b>	<b>TAX DUE</b>
3/1/2001 - 5/31/2001	\$158,734.18	\$13,095.57
9/1/1999 - 11/30/2000	\$615,151.45	\$50,749.97
6/1/2001 - 12/31/2002	\$1,021,036.51	\$86,788.10

14. On May 24, 2004, the Division issued three notices of determination, one each to PKD, petitioner and Thomas Serravillo, asserting that \$13,095.57 of additional sales tax, plus penalty and interest, was due for the quarter ending May 31, 2001. On August 16, 2004, the Division issued a Notice of Determination to PKD asserting that additional sales tax of \$137,538.07 (\$50,749.97 + \$86,788.10) was due for the periods September 1, 1999 to November 30, 2000 and June 1, 2001 through December 31, 2002. The Division, on September 7, 2004, next issued a separate Notice of Determination to both petitioner and Thomas Serravillo holding them each personally liable as a responsible officer of PKD for payment of the \$137,538.07 of tax, plus penalty and interest, allegedly due from PKD for the periods September 1, 1999 to November 30, 2000 and June 1, 2001 through December 31, 2002.<sup>1</sup>

### **THE BCMS PROCEEDINGS**

15. Petitioner filed requests for conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") protesting the notices of determination dated May 24, 2004 and September 7, 2004. There is no evidence in the record to support that petitioner initiated a proceeding in BCMS with respect to the Notice of Determination dated March 8, 2004.

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<sup>1</sup> Since PKD was incorporated on September 24, 1999, no tax was asserted due for the month of September 1999. Also, the audit period was ended on December 31, 2002 since this was the date PKD ceased business operations.

16. BCMS held two separate conciliation conferences, one on November 17, 2004, with respect to the Notice of Determination dated May 24, 2004, and the other on October 20, 2005, with respect to the Notice of Determination dated September 7, 2004. On December 16, 2005, BCMS issued a Conciliation Order wherein the tax due asserted in the Notice of Determination dated May 24, 2004 was reduced from \$13,095.57 to \$1,447.10, all penalties were canceled and interest was reduced to minimum rates. BCMS issued a second Conciliation Order, dated December 23, 2005, reducing the tax due asserted in the Notice of Determination dated September 7, 2004 from \$137,538.07 to \$10,397.19. The second Conciliation Order also canceled penalties and provided that interest was to be computed at minimum rates.

17. Although BCMS held two conciliation conferences and issued two conciliation orders, the reductions contained in both conciliation orders have their genesis in additional audit work performed by the Division at the direction of BCMS. The adjustments made as the result of the BCMS conferences are summarized as follows:

(a). Based on a review of a small percentage of sales contracts which petitioner was able to obtain from former customers of PKD the Division conceded that all of PKD's sales were nontaxable capital improvements and that therefore no sales tax was due from PKD, or petitioner, on sales.

(b). To verify that PKD was paying sales tax on all of its purchases of materials incorporated into capital improvements, a six-month test period, from December 1, 2000 to May 31, 2001, was chosen. Using a third-party verification audit methodology, the Division, by letter and subpoena, requested that certain suppliers of PKD furnish monthly summaries of all transactions, including related invoices, that said suppliers had with PKD for the test period December 1, 2000 to May 31, 2001. The Division's workpapers reflect that it received

responses from 11 suppliers and based on the responses it was determined that PKD had made purchases totaling \$72,602.14 from these 11 suppliers. The Division determined that the transcript of selected expense accounts report generated from the PKD Profit & Loss as of 2-20-02.xls file, which file was supplied by petitioner in his e-mail of April 16, 2004, reported purchases of only \$11,818.22 for the 11 suppliers who responded to the Division's request for third party verification. By subtracting reported purchases from audited purchases (\$72,602.14 - \$11,818.22) the Division concluded that purchases for the test period had been underreported by \$60,783.92, a margin of error of 514.32% ( $\$60,783.92 \div \$11,818.22$ ). The 514.32% margin of error was next applied to reported purchases of \$517,828.23, as shown the transcript of selected expense accounts report for the period January 1, 2000 to February 28, 2002, resulting in audited purchases of \$3,181,142.14 for the period January 1, 2000 to February 28, 2002.

(c). Information received from the 11 suppliers who responded to the Division's request for third-party verification revealed that nine suppliers had charged PKD the proper sales tax on all purchases made during the six-month test period. Two out-of-state suppliers, Corsi Cabinet Co., Inc. ("Corsi") and Fieldstone Cabinetry Inc. ("Fieldstone"), did not charge PKD any New York State sales tax on purchases made during the test period. Comparison of the sales tax paid by PKD to the nine suppliers who collected sales tax (\$5,579.33) to the sales tax that should have been paid on purchases made by PKD from all 11 suppliers (\$5,989.69), revealed that PKD had paid sales tax on 93.15% ( $\$5,579.33 \div \$5,989.69$ ) of purchases made during the test period. Since petitioner had failed to pay sales tax on 6.85% of its taxable purchases during the test period, this percentage was applied to the \$3,181,142.14 of audited purchases for the period January 1, 2000 to February 28, 2002, thus producing additional audited taxable purchases of \$217,936.76. Applying the appropriate tax rate to additional audited taxable



purchases of \$217,936.76 produced additional tax due of \$18,159.32 for the 26-month period January 1, 2000 to February 28, 2002.

(d). The Division next divided the \$18,159.32 of tax due for the period January 1, 2000 to February 28, 2002 by 26 (the number of months in this period) to compute an average monthly tax due of \$698.44. Since no purchase figures were provided for the three months of October, November and December 1999 and for the ten-month period March 1, 2002 to December 31, 2002, the Division determined that \$698.44 was due for each of these months. The revised audit determined that PKD owed \$27,239.04 for the period September 1, 1999 through December 31, 2002 ( $\$18,159.32 + \$9,079.72 [\$698.44 \times 13]$ ).

(e). Finally, it was determined that petitioner was not a responsible person for any taxes owed by PKD for periods after August 31, 2001. PKD's revised sales tax liability for the period September 1, 1999 to November 30, 2000 and March 1, 2001 through August 31, 2001 was \$11,844.29, and it is this amount that was reflected in the two conciliation orders issued by BCMS to petitioner. Also, all penalties assessed against petitioner were canceled.

#### **THE SMALL CLAIMS PROCEEDING**

18. On January 19, 2006, petitioner protested both BCMS conciliation orders issued to him individually by filing a single petition with the Division of Tax Appeals. Petitioner also included on the petition a BCMS conciliation order, dated December 16, 2005, issued to PKD for the quarter ending May 31, 2001. By letter dated January 24, 2006, the BCMS conciliation order issued to PKD for the quarter ending May 31, 2001 was returned to petitioner by the Division of Tax Appeals explaining that the corporation must file a separate petition for the conciliation order issued to it. The letter further advised petitioner that the January 19, 2006 "petition will go forward in your name only with the following assessments: L-023877229 [for

the quarter ending May 31, 2001] and L-024423415 [for the periods September 1, 1999 to November 30, 2000 and June 1, 2001 to December 31, 2002].”

19. Petitioner has represented himself throughout the audit process, the BCMS conferences and at the small claims hearing held herein. It was apparent at the small claims hearing that petitioner did not have a full understanding of the audit methodology utilized by the Division to determine the revised tax due amounts as set forth in the conciliation orders. In fact, it is not clear from the record whether petitioner ever received copies of the revised workpapers which resulted from the additional audit work directed by BCMS.

20. At the small claims hearing held in this matter, petitioner testified under oath, describing his various medical conditions and the struggles that he has had with his former partner, an individual petitioner believes cheated him and his spouse out of almost \$500,000.00. With respect to the audit conducted by the Division, petitioner testified that the two out-of-state suppliers, Corsi and Fieldstone, were new accounts established in January 2001; that PKD did no business with out-of-state suppliers prior to establishing the Corsi and Fieldstone accounts in January 2001 and that prior to January 2001 all of PKD’s suppliers were New York State vendors who charged and collected New York State sales tax on all of PKD’s purchases. When it became known to petitioner that the Division’s audit asserted that PKD’s books understated purchases by 514.32%, he found such assertion incredible and requested additional time to review the workpapers and submit evidence post hearing.

21. In his initial post hearing brief, petitioner submitted detailed documentary evidence, including printouts from PKD’s QuickBooks ledger for the eight-month period November 1,

2000 through June 1, 2001.<sup>2</sup> The QuickBooks ledger was originally contained in electronic format and petitioner, believing that this was the most accurate information available, had previously offered the disks, along with the installation program, to the Division for its review. The Division either did not, or could not, open this electronic file.

22. In addition to the printed QuickBooks ledger for the eight-month period, petitioner submitted copies of PKD's corresponding bank summary statements which coincide with and support the accuracy of the printed QuickBooks ledger. Petitioner next traced the purchase information obtained by the Division from the 11 suppliers who responded to the Division's request for information to the printed QuickBooks ledger, and no substantive omissions or discrepancies were found. In fact, payments made by PKD to the 11 responding suppliers as reported on the printed QuickBooks ledger totaled \$84,290.66, which amount is slightly more than the \$78,181.47 in total purchases, including sales tax, that was reported by the 11 suppliers to the Division. The \$11,818.22 figure used by the Division as purchases per the general ledger for the 11 suppliers who responded to the request for information, which amount was used by the Division as the denominator in the computation of its 514.32% margin of error, was not an accurate representation of PKD's actual purchases and apparently was a partial list of bills, service charges, late charges and other petty cash type items.

23. To substantiate PKD's business activity with Corsi, petitioner submitted a letter, dated August 23, 2006, from Corsi's controller which stated as follows:

Attached, please find a recap of transactions between Corsi and PKD. You never actually did any business for Corsi and the recap sheet indicates you purchased only sales aids. The "VIGN" designates vignette

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<sup>2</sup> While the Division utilized the six-month test period December 1, 2000 to May 31, 2001, petitioner included both the month before (November 2000) and the month after (June 2001) in his submission in the event that any invoices or checks overlapped into either of these two months.

and the "SUKIT" is our start-up kit. All other transactions are either literature or finance charges.

24. The recap sheet provided by Corsi reflects that PKD's first transaction with Corsi occurred on February 12, 2001 in the amount of \$7,905.95. A second transaction occurred on April 20, 2001 with a \$200.00 purchase by PKD. There were five additional sales transactions shown on the recap sheet; however, all five occurred after the August 31, 2001 date that petitioner is being held responsible for the taxes owed by PKD. In his initial post hearing brief petitioner described the items purchased from Corsi in February 2001 and April 2001 as "display items, doors and moldings, kept on the floor, and never sold or installed . . . ." Petitioner questions whether these items are taxable.

25. Both petitioner and the Division attempted on several occasions without success to obtain detailed information from Fieldstone concerning purchases made by PKD. In fact, the envelope which contained the subpoena issued by the Division to Fieldstone was returned as "refused." Although the record herein contains no evidence that Fieldstone ever responded to the Division's request for information, the Division's workpapers actually include Fieldstone as one of the 11 suppliers who responded to its request for information. Specifically, the Division's workpapers show a December 30, 2000 purchase, via check number 1959, in the amount of \$61.57 and that no sales tax was charged or paid on this purchase. With his initial brief petitioner submitted a copy of check number 1959 which was dated December 28, 2000 and was payable to L. I. Hardware in the sum of \$79.26. Information received from L. I. Hardware verifies that it in fact received check number 1959 from PKD in the sum of \$79.26. The Division offered no explanation for this discrepancy.

26. Petitioner does not dispute that PKD failed to pay sales tax on purchases it made from out-of-state vendors. Petitioner argues that PKD first started making purchases from out-

of-state vendors in January 2001 and that no out-of-state purchases were made before this date. Petitioner voluntarily produced information regarding out-of-state purchases made by PKD not only from Corsi and Fieldstone, but also from two additional out-of-state vendors, Designer Choice Cabinerty (“Designer”) and Greenfield, which vendors were not reflected in the Division’s six-month test period. The following table reflects the purchases made by PKD from the above four out-of-state vendors during the period January 1, 2001 through August 31, 2001, the final date that petitioner ceased being held responsible for the taxes due from PKD, and the resultant tax due:

<b>PURCHASES</b>	<b>Q/E 2-28-2001</b>	<b>Q/E 5-31-2001</b>	<b>Q/E 8-31-2001</b>
Corsi	\$7,905.95	\$200.00	\$-0-
Fieldstone	6,384.04	10,995.85	5,489.53
Designer	-0-	-0-	3,205.81
Greenfield	-0-	-0-	3,112.10
Total	\$14,289.99	\$11,195.85	\$11,807.44
Tax Rate	x 8.25%	x 8.25%	x 8.5%
Tax Due	\$1,178.92	\$923.66	\$1,003.63

While petitioner concedes that PKD is liable for the taxes shown due in the above table, he maintains that he should not be held liable for the entire amount due from PKD, but instead only one-half of the tax and interest due. Petitioner believes that Thomas Serravillo, as the other officer and shareholder of PKD, should be held liable for payment of the remaining one-half due from PKD.

***CONCLUSIONS OF LAW***

A. The standard for reviewing a sales tax audit was set forth in *Matter of AGDN, Inc.* (Tax Appeals Tribunal, February 6, 1997), as follows:

a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a]; 1135; 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained “shall include a true copy of each sales slip, invoice, receipt, statement or memorandum” (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, “the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . .” (Tax Law § 1138[a]; *see, Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (*Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451).

B. In this case, the record establishes the Division’s clear and unequivocal written requests for PKD’s books and records, and the corporation’s failure to keep or produce such records for the Division’s review. Standing alone, PKD’s QuickBooks ledger, whether in electronic format or in printed form, does not constitute adequate books and records. As noted in *Matter of Got-A-Lot-A-Dough, Inc.* (Tax Appeals Tribunal, November 16, 2006), the petitioner therein provided:

some of their financial information in the form of Quickbooks to the auditor, which they imply should have been sufficient for audit purposes. As the Administrative Law Judge noted, however, a vendor is required to maintain accurate, complete and verifiable books and records and provide such records for audit upon request of the Division (*see*, Tax Law §§ 1138[a], 1135, 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required

to be maintained shall include a true copy of each sales slip, invoice, receipt, statement or memorandum (*see*, Tax Law § 1135).

C. Tax Law § 1132(c)(1) provides for a presumption that all sales “are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect the tax or the customer.” It is well established that every person required to collect tax must maintain and make available for audit records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Having established the insufficiency of the corporation’s books and records, and in the absence of any evidence to the contrary, the Division initially properly concluded that all of PKD’s sales were taxable (*see, Matter of Petak v. Tax Appeals Tribunal*, 217 AD2d 807, 629 NYS2d 547; *Matter of Academy Beer Distribs. v. Commr.*, 202 AD2d 815, 609 NYS2d 108, *lv denied* 83 NY2d 759, 616 NYS2d 14). Furthermore, the method utilized by the Division to compute PKD’s sales was reasonable, and therefore the notices of determination at issue herein were based on an audit method reasonably calculated to determine the amount of tax due. Hence, the only issue is whether petitioner has established that the amount of tax assessed as a result of the application of the audit method employed herein, as modified by the BCMS conciliation orders, was erroneous.

D. After a careful review of the comprehensive documents submitted by petitioner with his initial post hearing brief, I am satisfied that he has met his burden of proof to show wherein the notices of determination are erroneous. Specifically, petitioner’s credible testimony, coupled with the substantial documentary evidence adduced herein, support that PKD did not understate its purchases during the six-month test period by 514.32% as alleged by the Division. Petitioner has shown that PKD’s purchase records for the test period were in substantial agreement with the third-party information the Division obtained from the responding suppliers and that the

Division's use of \$11,818.22 as the amount reported by PKD in its general ledger as purchases from the responding suppliers was not accurate. Accordingly, that portion of the Division's audit which increased purchases by 514.32% is canceled.

E. Petitioner has also established that PKD made tax-free purchases from out-of-state suppliers starting January 1, 2001 and that, prior to this date, it used only in-state suppliers who charged and collected the proper sales tax due on all purchases made by PKD. Accordingly, PKD's sales and use tax liability for the period that petitioner is being held personally liable is \$3,106.21 as shown in Finding of Fact "26". In his brief, petitioner questions the taxable status of PKD's purchases from Corsi "of display items, doors and moldings, kept on the floor, and never sold or installed." These items represent PKD's purchases of tangible personal property at retail and are subject to tax in accordance with Tax Law § 1101(b)(1); § 1110(a) and 20 NYCRR 526.3, 531.1.

F. In the instant matter, the parties agree that petitioner was a person responsible for the collection and payment of sales and use tax on behalf of PKD from its inception until August 31, 2001. While petitioner's argument that he should be held liable for payment of only one-half of the tax and interest owed by PKD has a certain logical appeal, it must be rejected as not supported by statute or case law. The Division is not obligated to collect unpaid sales tax (plus penalty and interest) equally from all parties who might be liable (*Matter of Milne*, Tax Appeals Tribunal, February 17, 2005 [wherein the Tribunal affirmed the Administrative Law Judge's determination that the Division need not proceed against another officer who might be equally liable for a corporation's unpaid sales tax]). 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 . . . ," thereby creating joint and several



liability for unpaid sales tax. Since there is explicit statutory language that creates joint and several liability, the Division may proceed against petitioner for the entire amount due from PKD up until August 31, 2001. It is for petitioner then to decide whether to seek contribution from any fellow officer. In effect, it is he, not the Division, who must bear the task of pursuing his former business associate.

G. Finally, petitioner has argued that this proceeding should include all three notices of determination issued to him by the Division. As noted previously, there is no evidence to show that petitioner timely protested the Notice of Determination dated March 8, 2004 issued for the quarter ending February 28, 2001. Although the petition filed with the Division of Tax Appeals referenced three assessment numbers, it is noted that one of the assessment numbers pertained to an assessment issued to PKD for the quarter ending May 31, 2001, a period already at issue in this proceeding since petitioner timely protested the assessment issued to him personally for this quarter. Accordingly, I have no jurisdiction over the Notice of Determination dated March 8, 2004 pertaining to the quarter ending February 28, 2001. Given the nature of the audit conducted by the Division, the evidence presented by petitioner to refute the audit results and taking into consideration that the facts and issues presented for review herein are intertwined regardless of what quarter was reviewed, it was necessary for me to address the tax due for the quarter ending February 28, 2001, notwithstanding the fact that I have no jurisdiction over this quarter. While I have no authority to modify the tax asserted due in the Notice of Determination dated March 8, 2004 for the quarter ending February 28, 2001, the Division can, if in agreement with the results reached herein, voluntarily modify said Notice of Determination consistent with this determination. If no such voluntary modification is made, petitioner is not without recourse as he can pay the amount asserted due for the quarter ending February 28, 2004, file a claim for

refund (Tax Law § 1139[c]) and if denied, initiate a new proceeding in BCMS or the Division of Tax Appeals seeking a refund.

H. The petition of Roy Hovland is granted to the extent that the tax due as asserted in the Notice of Determination dated May 21, 2004 is reduced to \$923.66, plus interest; the tax due asserted in the Notice of Determination dated September 7, 2004 is reduced to \$1,003.63, plus interest and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York  
May 3, 2007

/s/ James Hoefer  
PRESIDING OFFICER