STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petitions | : | |
| of | : | |
| **LA NAJ HOME FURNISHINGS, INC. AND IBRAHIM BASIR** | : | DETERMINATION DTA NOS. 823456 AND 823457 |
| for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2005 through May 31, 2008. | : | |

Petitioners, La Naj Home Furnishings, Inc., and Ibrahim Basir, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2005 through May 31, 2008.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, One Penn Plaza, New York, New York, on June 1, 2011, at 10:00 A.M., with all briefs to be submitted by September 2, 2011, which date commenced the six-month period for issuance of this determination. Petitioner Ibrahim Basir appeared pro se and for the corporate petitioner as its president. The Division of Taxation appeared by Mark F. Volk, Esq. (Lori P. Antolick, Esq., of counsel).

## *ISSUES*

I. Whether the audit methodology utilized by the Division of Taxation in its audit of La Naj Home Furnishings, Inc., had a rational basis and was reasonably calculated to reflect the taxes due.

II. Whether petitioners have established that the audit method employed was unreasonable and whether the amount of tax assessed as the result of the application of the method used in this case was erroneous.

III. Whether Ibrahim Basir was a person responsible for the collection and payment of sales and use taxes on behalf of La Naj Home Furnishings, Inc., within the meaning and intent of Tax Law § 1131(1) and § 1133(a).

## *FINDINGS OF FACT*

1. During the period at issue, petitioner Ibrahim Basir was the president and sole shareholder of petitioner La Naj Home Furnishings, Inc. (La Naj) a retail furniture business. La Naj had stores in Yonkers, New York (two stores), Rockland County, New York, and Paramus, New Jersey.

2. On July 23, 2008, the Division of Taxation (Division) sent a letter to La Naj stating that the business's sales and use tax records had been scheduled for a field audit for the period December 1, 2005 through May 31, 2008. The letter stated that "[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date." The appointment date indicated on the letter was August 13, 2008. A schedule of books and records to be produced was attached to the letter. The letter specifically requested among other records, the general ledger, sales invoices, cash register tapes and bank statements for the entire audit period.

3. On August 13, 2008, the auditor went to the business's location to conduct the audit. Mr. Basir was not present, and an employee telephoned Mr. Basir to advise him to contact the auditor. On August 15, 2008 and September 8, 2008, the auditor left messages with Mr. Basir to telephone him so they could arrange a new appointment to begin the audit. These telephone calls

were not returned. On September 19, 2008, the Division mailed a second letter to La Naj stating that the business's sales and use tax records had been scheduled for a field audit for the period at issue. This letter was returned to the Division by the United States Postal Service. On October 3, 2008, a field visit indicated that the business was closed.

4. The Division concluded that in the absence of any records being produced in response to its requests, La Naj's records were inadequate for the purpose of verifying its tax liability with respect to sales. The Division determined that the lack of original source documents detailing La Naj's sales precluded the Division from tracing any transaction back to the initial sale or forward to the amount of sales reported. In the face of a total lack of records, the auditor decided to employ an indirect audit method to calculate the amount of taxable sales. The indirect audit method chosen was to use the results of a prior audit of La Naj that was performed for the period March 1, 2003 through November 30, 2005, the period that directly preceded the current audit period.

5. In the previous audit, the Division first reviewed in detail and totaled La Naj's sales as indicated by the approximately 630 sales invoices dated within the test period of March 1, 2004 through May 31, 2004. Next, the Division subtracted $126,265.63, representing undelivered items, returned merchandise and invoices used for training purposes, from the total of $1,036,327.52 to calculate audited gross sales for the test quarter of $910,061.89. The Division calculated an error rate by dividing the difference between audited gross sales and reported gross sales of $513,608.00 for the test quarter by reported gross sales for the test quarter.

6. The auditor in the present matter totaled gross sales per La Naj's sales tax returns and then multiplied the total by the error rate of the previous audit to arrive at additional gross sales. Additional gross sales were added to gross sales reported to determine audited sales, which were

multiplied by the taxable ratio computed during the previous audit to determine audited taxable sales. The taxable ratio of 84.49 percent was determined by calculating the ratio of taxable sales to gross sales as indicated by the sales invoices for the test period of the previous audit. The auditor subtracted reported taxable sales from audited taxable sales to arrive at additional taxable sales. Additional taxable sales were multiplied by an average tax rate to determine additional tax due of $298,194.41.

7. On December 15, 2008, petitioners provided to the auditor a computerized sales journal that grouped La Naj's sales according to the town or city where the merchandise was delivered. For each sale, the journal listed an invoice number, invoice date, customer (a five letter identification), sales amount, taxable or nontaxable classification and sales tax amount. The auditor did not use the sales journal in the audit because certain sales had been zeroed out, the invoice numbers were not sequential and La Naj did not have any source documentation to verify the information listed in the journal.

8. On January 2, 2009, the Division issued to La Naj a Notice of Determination for the period December 1, 2005 through May 31, 2008 assessing tax due of $298,194.41, plus penalty and interest. On the same date, the Division issued to petitioner Ibrahim Basir a Notice of Determination for the same period, assessing tax due of $298,194.41, plus penalty and interest. The notice advised petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from La Naj and therefore personally liable for La Naj's sales and use tax liability.

9. Mr. Basir did not prepare La Naj's sales tax returns, but he did sign the sales tax returns and pay the sales tax on behalf of La Naj for the entire period at issue.

10. On August 21, 2008, Mr. Basir, as president of the debtor, La Naj, and the Bank of America, as a secured creditor, agreed to a management company's proposal to conduct a secured party sale of certain collateral in the form of inventory of La Naj, located in Yonkers, New York. On September 5, 2008, attorneys representing the Bank of America informed, among others, La Naj and the Department of Taxation and Finance of the public sale and disposition of collateral to take place on September 9, 2008, at La Naj's business location. The notice of sale indicated that the collateral consisted of "[a]ll business assets of the Debtor," La Naj Home Furnishings, Inc.

***CONCLUSIONS OF LAW***

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every retail sale of tangible personal property.

B. Tax Law § 1135(a)(1) provides that "[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require." Such records include a copy of "each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven thirty-two requires that the tax be stated separately." (***Id.***; 20 NYCRR 533.2[b][1].)

C. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return is not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . ." (Tax Law § 1138[a][1]). When acting pursuant to section 1138(a)(1), the Division is required to select an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the

audit methodology or the amount of the assessment was erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003).

D. The standard for reviewing a sales tax audit where an indirect audit methodology has been employed in the determination of sales tax liability is well established and 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).
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> 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).

E. In this matter, the Division made a proper request for La Naj's books and records. On July 23, 2008, the Division sent an appointment letter to La Naj advising that the business operation was to be audited for the period at issue. On the date of the appointment, the auditor went to the business location but Mr. Basir was not present. An employee contacted Mr. Basir to request that he contact the auditor. The auditor made two subsequent telephone calls to Mr.

Basir in an attempt to reschedule the audit, but these calls were not returned. A second appointment letter was sent to La Naj, but was returned by the United States Postal Service. The first appointment letter dated July 23, 2008 was not returned to the Division. Considering the Division's efforts to conduct an audit of La Naj, Mr. Basir's failure to respond to the auditor's attempts to schedule an appointment to conduct the audit, the appointment letter of July 23, 2008 and the lack of any credible evidence that petitioners did not receive such appointment letter, it is concluded that the Division, by letter dated July 23, 2008, made a proper request for the business's books and records for the period at issue.

It was not until December 15, 2008 that petitioners presented the sales journal to the auditor. This record was clearly insufficient to verify taxable sales since there were no sales records that would allow the auditor to trace any transaction back to the original source or to verify the amount of taxable sales. The almost total lack of sales records made it impossible to verify taxable sales through a complete audit from which the exact amount of tax due could have been determined. Accordingly, it was proper for the Division to resort to the use of external indices (***Matter of Karay Restaurant Corp. v. Tax Appeals Tribunal***, 274 AD2d 854, 711 NYS2d 853 [2000], ***lv denied*** 96 NY2d 702, 722 NYS2d 794 [2001]; ***Matter of Sarantopoulos v. Tax Appeals Tribunal***, 186 AD2d 878, 589 NYS2d 102 [1992]). Accordingly, and in view of the foregoing, the only questions presented in this case are whether petitioners have established that the audit method employed was unreasonable and whether the amount of tax assessed as the result of the application of the method used in this case was erroneous (***Matter of Surface Line Operators Fraternal Organization***). Mere allegations of error are insufficient to show that the selected method of audit was unreasonable or that the amount of tax determined thereby was

erroneous (***Matter of Vebole Edibles***, 162 AD2d 765, 557 NYS2d 678 [1990], ***lv denied*** 77 NY2d 803, 567 NYS2d 643 [1991]).

F. Petitioners have not established that the audit method was unreasonable or that the amount of tax determined by application of such method was erroneous. The reason for a taxpayer's failure to provide adequate books and records is largely irrelevant to the Division's right to turn to indirect audit methodologies in determining the amount of tax due in the face of such failure (***Matter of Sole to Sole, Inc.***, Tax Appeals Tribunal, July 1, 1993). Further, having established the inadequacies of a taxpayer's records, the Division is under no obligation to utilize one indirect method of audit as opposed to another, but rather must only select a method of audit reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph***). Nor is a taxpayer entitled to have an audit performed upon its records in part or in whole when, as here, such records are incomplete and inadequate (***Matter of Estate of Manno v. Tax Commn.***, 147 AD2d 805 537, NYS2d 683 [1989], ***lv denied*** 74 NY2d 610, 546 NYS2d 554 [1989], ***cert denied*** 498 US 813 [1990]).

G. As La Naj was closed at the time the audit was being undertaken, the Division's use of its findings determined as part of an earlier audit was a reasonable course of action. In addition, the Tax Appeals Tribunal has recently upheld the audit methodology employed and the results of the earlier audit (***Matter of Basir***, Tax Appeals Tribunal, November 23, 2011). The same absence of sales records as was found here also existed for the earlier audit of La Naj's business. The absence of such records herein precluded the Division from verifying the amounts contained in the sales journal and the taxable sales reported on La Naj's sales tax returns. Under these circumstances, and notwithstanding that the error rate upon which the Division's calculations were premised occurred as part of an earlier audit, the Division's resort to the use of

such method of audit was a reasonable method of determining La Naj's sales tax liability for the period in issue (***see Matter of Mustafa***, Tax Appeals Tribunal, December 27, 1991).

H. Petitioners, in essence, appear to take issue with the Division's audit result because it is imprecise. As a general proposition, any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of its sales as required by Tax Law § 1135(a)(1) must be borne by that taxpayer (***Matter of Markowitz v. State Tax Commission***; ***Matter of Meyer v. State Tax Commission***). The burden of proof rested upon petitioners to show by clear and convincing evidence that the audit method was flawed or the amount of tax assessed was incorrect (***Matter of Surface Line Operators Fraternal Org. v. Tully***). Petitioners have not presented any evidence to satisfy this burden with regard to any of their allegations as to the audit methodology or the results thereto. Ultimately, petitioners' failure to maintain or provide any records of their purchases and sales does not provide a basis for changing the Division's audit results.

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

J. The mere holding of corporate office does not, per se, impose tax liability upon an office holder (***see Matter of Vogel v. New York State Dept. of Taxation & Fin.***, 98 Misc 2d 222, 413 NYS2d 862 [1979]; ***Matter of Chevlowe v. Koerner***, 95 Misc 2d 388, 407 NYS2d 427 [1978]; ***Matter of Unger***, Tax Appeals Tribunal, March 24, 1994, ***confirmed*** 214 AD2d 857, 625 NYS2d 343 [1995], ***lv denied*** 86 NY2d 705, 632 NYS2d 498 [1995]). Rather, whether a person

is an officer or employee liable for tax must be determined upon the particular facts of each case (***Matter of Cohen v. State Tax Commn***., 128 AD2d 1022, 513 NYS2d 564 [1987]; ***Matter of Hall*****,** Tax Appeals Tribunal, March 22, 1990**,** ***confirmed*** 176 AD2d 1006, 574 NYS2d 862 [1991]; ***Matter of Martin***, Tax Appeals Tribunal, July 20, 1989, ***confirmed*** 162 AD2d 890, 558 NYS2d 239 [1990]; ***Matter of Autex Corp.***, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether a person is authorized to sign the corporation's tax returns, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]). As summarized in ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990):

> [t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (***Cohen v. State Tax Commn***, ***supra***, 513 NYS2d 565; ***Blodnick v. State Tax Commn***., 124 AD2d 437, 507 NYS2d 536, 538, ***appeal dismissed*** 69 NY2d 822, 513 NYS2d 1027; ***Vogel v. New York State Dept. of Taxation & Fin***., ***supra***, 413 NYS2d at 865; ***Chevlowe v. Koerner***, ***supra***, 407 NYS2d at 429; ***Matter of William Barton***, [Tax Appeals Tribunal, July 20, 1989]; ***Matter of William F. Martin***, ***supra***; ***Matter of Autex***, ***supra***).

K. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (***Matter of Constantino***; ***Matter of Chin***, Tax Appeals Tribunal, December 20, 1990). In order to prevail, petitioner Ibrahim Basir "was required to establish by clear and convincing

evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but was thwarted by others in carrying out his corporate duties through no fault of his own [citations omitted]" (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

L. Petitioner Ibrahim Basir was president and sole shareholder of La Naj. He signed sales tax returns and paid sales tax on behalf of La Naj during the period at issue. He represented La Naj in the audit. He signed the agreement on behalf of La Naj to a management company's proposal to conduct a secured party sale of certain collateral in the form of inventory of La Naj, for the benefit of the Bank of America, as a secured creditor of La Naj. These facts establish that Mr. Basir was a responsible officer of La Naj pursuant to Tax Law Tax Law § 1131[1]) and therefore personally liable for tax assessed against La Naj pursuant to Tax Law § 1133(a) (***see Matter of Martin v. Commissioner of Taxation & Fin.***, 162 AD2d 890, 558 NYS2d 239 [1990]; ***Matter of Vogel v. New York State Dept. of Taxation & Fin***.; ***Matter of Basir*** [where the Tax Appeals Tribunal found petitioner Ibrahim Basir to be a responsible officer of La Naj for the preceding audit period]).

M. The petitions of La Naj Home Furnishings, Inc., and Ibrahim Basir are denied, and the notices of determination dated January 2, 2009, together with penalties and interest thereon, are sustained.

DATED: Troy, New York
December 29, 2011

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE