STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION DTA NO. 823608
PATRICK KIERAN	:	
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2006 through August 31, 2007.	:	

Petitioner, Patrick Kieran, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on September 12, 2013. Petitioner appeared by Grassi & Co. (David A. Shuster, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian McCann, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in lieu of a formal brief in support of its exception and in opposition to petitioner's exception. Petitioner filed a brief in opposition to the Division of Taxation's exception and in reply to the Division of Taxation's letter brief in opposition. The Division of Taxation filed a letter brief in lieu of a formal brief in reply to petitioner's brief in opposition. Oral argument was heard on May 14, 2014 in Albany, New York.

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

ISSUES

I. Whether petitioner was personally liable for the sales and use taxes due on behalf of

Bay Chevrolet, Inc., as a person required to collect and pay such taxes under Tax Law §§ 1131 (1) and 1133 (a).

II. Whether, if petitioner was such a responsible person, the Division of Taxation can assert such liability against petitioner for the quarter ended August 31, 2006, where the Division of Taxation's answer affirmatively stated that the notice of determination issued to petitioner for that period was fully paid.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 1, 3-8, 11, 12, 15-18, 20, 21, 24-31 and 34, which we have modified. We also make additional findings of fact, numbered 36, 37, 38 and 39 herein. We make these changes to more accurately reflect the record. The Administrative Law Judges's findings of fact, the modified findings of fact and the additional facts are set forth below.

1. Patrick Kieran (petitioner) is the former president of Bay Chevrolet, Inc. (Bay Chevrolet or the dealership). The Division of Taxation (Division) assessed petitioner for Bay Chevrolet's sales and use tax deficiencies for the periods in issue as a responsible person pursuant to Tax Law §§ 1131 (1) and 1133 (a).

2. Bay Chevrolet was a General Motors Corporation (GM) authorized car dealership operating in Douglaston, New York.

3. Petitioner has experience with automobile dealerships dating back to 1978. Over that time, he has had a Dodge dealership, two Mitsubishi dealerships, a Hyundai dealership and two Chevrolet dealerships.

4. Petitioner's involvement with Bay Chevrolet commenced in 2005, when he bought the

franchise from GM for $1,050,000.00, with an investment of his own funds; money from investors that petitioner secured; and financing by General Motors Acceptance Corporation (GMAC). At that time, petitioner was required to execute a dealer sales and service agreement with GM. Pursuant to that agreement, petitioner was required to engage GMAC, or some other creditworthy financial institution reasonably acceptable to GM, to support Bay Chevrolet's floor plan line and its purchase of new vehicles.

5. Bay Chevrolet opted to finance its inventory purchases through a floor plan financing agreement with GMAC, along with additional working capital financing in the amount of $600,000.00. This financing agreement was typical for GM authorized car dealerships. The financing agreement included a "sweep arrangement" that afforded GMAC access to Bay Chevrolet's general bank account. This general account held payments by customers for the purchase of vehicles, parts, accessories, and automobile repair services. It also held sales taxes collected from customers. When Bay Chevrolet's business was ultimately in trouble, GMAC exercised its rights under the sweep arrangement, collecting what was due from the dealership directly from Bay Chevrolet's general bank account, including sales taxes collected from customers.

6. Bay Chevrolet failed to timely file its sales and use tax returns for the quarters ending November 30, 2006, February 28, 2007, May 31, 2007 and August 31, 2007. As a consequence, the Division issued four notices of estimated determination dated May 5, 2008 to petitioner as a responsible officer of Bay Chevrolet, as follows:

Period	Assessment No.	Estimated Sales Tax
9/1/06-11/30/06	L-029928710	$236,044.56
12/1/06-2/28/07	L-029928709	$354,066.84
3/1/07-5/31/07	L-029928708	$354,066.84
6/1/07-8/31/07	L-029928707	$354,066.84

The notices of estimated determination also assessed penalties and interest.

7. The sales tax returns for these four quarters were subsequently late-filed, with partial or no remittance with the filing, as follows:

Period	Assessment No.	Tax Due per sales tax return	Remittance	Tax Due
9/1/06-11/30/06	L-029928710	$81,907.14	$7,500.00	$74,407.14
12/1/06-2/28/07	L-029928709	$52,043.23	0	$52,043.23
3/1/07-5/31/07	L-029928708	$41,895.20	0	$41,895.20
6/1/07-8/31/07	L-029928707	$15,236.30	0	$15,236.30

8. The notices of estimated determination referenced in Finding of Fact 6 were adjusted to reflect the tax due for each of the returns as filed, plus penalties and interest.

9. Assessment L-029928711, a fifth notice, is also at issue. The dealership filed one of its part-quarterly sales tax returns late for the quarter ended August 31, 2006. A notice of determination dated May 5, 2008 was issued by the Division to petitioner for that quarter (L-029928711), asserting sales tax due in the amount of $160,010.39, plus penalties and interest, with assessment payments and credits of $57,909.28 applied thereto.

10. The Division issued to petitioner a consolidated statement of tax liabilities dated May 15, 2009, concerning all five notices. Assessments L-029928707, L-029928708, L-029928709, and L-029928710 listed the sales tax due as set forth in Finding of Fact 7, and included the $7,500.00 payment on assessment L-029928710 when listing the tax due.

Separately, the consolidated statement listed assessment L-029928711 for the quarter ended August 31, 2006, showing the tax amount due as $160,010.39, plus penalties and interest, and assessment payments and credits in the amount of $245,507.08, resulting in a “current balance due” of zero.

11. Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS). Following a conference on October 8, 2009, a conciliation order was issued to petitioner on January 29, 2010 that sustained all five statutory notices.

12. Prior to the issuance of the conciliation order, BCMS sent a conciliation consent form to petitioner. The consent form reflected the same tax due amounts, plus penalties and interest, as those set forth in the consolidated statement of tax liabilities dated May 15, 2009 (***see*** Finding of Fact 10). Petitioner did not sign the conciliation consent form.

13. A timely petition was filed with the Division of Tax Appeals on April 28, 2010, protesting the conciliation order. The petition lists all five notices, and indicates in the petition that "tax amount determined was $183,581.57 and the amount of tax contested is $183,581.57."[1]

14. On or about August 11, 2010, the Division filed its answer, in which the Division stated:

> AFFIRMATIVELY STATES that, the corporation late-filed one of its part quarterly returns in the quarter ending 8/31/06: the June 2006 return was due on 7/20/06, but was not filed until 7/27/06.
>
> * * *
>
> AFFIRMATIVELY STATES that, by the foregoing, a Notice of Determination for that quarter (#L-029928711) was issued to the Petitioner, *but has since been fully paid by another party*, and the Petitioner paid none of the tax, penalty and interest (emphasis supplied).

15. A printout from the Division's CARTS-Assessments Receivable system dated October 2, 2012 indicates a balance of tax due for assessment L-029928711 of $105,679.11, plus penalties and interest.[2] Similar CARTS printouts dated September 27, 2012 show the

---

[1] The tax due on notices L-029928707, L-029928708, L-029928709 and L-029928710 totals $183,571.87.

[2] The Division does not provide an explanation for the discrepancy between the Consolidated Statement of Tax Liabilities (showing a zero balance), the Division's answer (stating the balance is paid in full), and the CARTS printout of the amount due ($105,679.11) for Assessment L-029928711.

balances of tax due for assessments L-029928710, L-029928709, L-029928708, L-029928707 to be $74,407.14, $52,043.23, $41,895.20, and $15,236.30, respectively, plus penalties and interest.

16. The Division submitted into evidence an election by the dealership, a federal S corporation, to be treated as a New York S corporation (form CT-6) that listed petitioner among four owners of 25 shares of stock of Bay Chevrolet. This document was signed on behalf of Bay Chevrolet by petitioner as president. It was received by the Division's Corporate Tax Registration unit on September 26, 2005.

17. The Division's auditor made a field visit to Bay Chevrolet in early 2008, but found the business had been closed down.

18. The Division also assessed another officer of Bay Chevrolet as a responsible person in connection with the unpaid sales taxes at issue in the present matter. An administrative law judge determination concluded that such other officer was not a responsible person for Bay Chevrolet for purposes of Tax Law § § 1131 (1) and 1133 (a) (***Matter of Kabacinski***, Division of Tax Appeals, September 30, 2010).

19. Petitioner was responsible for the day-to-day operations of Bay Chevrolet. He dealt with GM and GMAC on all significant business matters, ordered inventory, and hired and fired employees. He also signed checks, tax returns and bank documents.

20. Bay Chevrolet's New York State and local sales and use tax return for part-quarterly period June 1, 2006 through June 30, 2006 was signed by petitioner on July 26, 2006 and reports an amount due of $64,058.98. A check signed by petitioner dated July 26, 2006 in the amount of $64,058.18[3] was filed with the return. Bay Chevrolet's New York State and local sales and use tax return for part-quarterly period July 1, 2006 through July 31, 2006 was signed by petitioner

[3] No explanation as to the difference in amounts was provided.

on August 21, 2006 and reports an amount due of $54,998.29. A check signed by petitioner dated August 21, 2006 for the same amount was filed with the return.

Bay Chevrolet's New York State and local quarterly sales and use tax return for quarterly period June 1, 2006 through August 31, 2006 was signed by petitioner[4] on September 20, 2006 and reports an amount due of $235,010.39. A check signed by petitioner dated September 20, 2006 in the amount of $75,000.00 was filed with the return.

21. Bay Chevrolet's New York State and local sales and use tax returns for part-quarterly filers and the New York State and local quarterly sales and use tax returns for the remaining periods at issue (September 1, 2006 through August 31, 2007) were signed by someone other than petitioner.

22. Four business signature cards created on July 29, 2005, for separate bank accounts of Bay Chevrolet, bore the signature of petitioner as president. Three other names and signatures also appeared on the signature cards.

23. Another account, referred to as the debtor in possession account, was opened on July 27, 2007, and bore the printed name and signature of petitioner as president. No other names were listed on this account.

24. The auditor collected a sampling of checks from Bay Chevrolet's books. One dated February 16, 2007 was made out to "AFC" (identified by petitioner as a finance company); a second dated August 21, 2007 was made out to the New York State Insurance Fund; and two others were payroll checks dated August 31 and October 4, 2007, respectively. All were signed by petitioner as president of Bay Chevrolet.

25. On January 9, 2009, the Division's auditor issued a subpoena duces tecum to GM

[4] Although the Division's auditor testified that this signature did not appear to be petitioner's, it is found to be substantially similar enough to other signatures identified without challenge to be petitioner's signature.

requesting the production of documents concerning Bay Chevrolet. Pursuant to that request, the auditor received a GMAC dealer sales and service agreement dated September 20, 2005, signed by petitioner and the regional general manager for GMAC. Pursuant to the dealer sales and service agreement, the parties agreed that petitioner would be the dealer operator of Bay Chevrolet, and that he would provide personal services in this regard by exercising full managerial authority over dealership operations.

26. A dealer statement of ownership for Bay Chevrolet was submitted as part of the record. It lists four owners, including petitioner, all of whom owned 50 shares and a 25% ownership interest.[5] Three of the listed owners, including petitioner, were reported on the statement as active in the dealership. Further documents submitted as part of the record that appear to involve an acquisition of Douglaston Chevrolet list information concerning all four owners of Bay Chevrolet. Within that information, all of the owners of Bay Chevrolet except petitioner are described as "financial investor," though two of them are listed as vice presidents of Bay Chevrolet. Petitioner is the only owner listed as "dealer owner/operator," and the submitted documents note his company position as president. Petitioner's signature in his capacity as president of Bay Chevrolet appears on the last page of this set of documents.

27. Bay Chevrolet leased dealership space from Argonaut Holdings, Inc., a wholly-owned subsidiary of GMAC. At the time of the closing of the dealership, Bay Chevrolet owed Argonaut Holdings approximately $400,000.00 in back rent.

28. Bay Chevrolet had four separate bank accounts: 1) an investment account, when there were excess funds to invest; 2) a payroll account that was set up so that the outside service provider handling payroll could sweep this account to meet payroll; 3) a general account that was

[5] There is no explanation in the record for the discrepancy between the number of shares reported in the dealer statement of ownership and Bay Chevrolet's S corporation election form (***see*** Finding of Fact 16).

used for everyday operations of the business; and 4) an account used to pay necessary Department of Motor Vehicle fees upon the sale of cars to customers. When the business met with financial troubles, the general account was effectively controlled by GMAC through the sweep arrangement. At that point, GMAC would contact Bay Chevrolet's controller to determine how much money would be needed to cover payroll and essential bills, such as insurance and utilities, and would make funds available to cover those costs.

29. Bay Chevrolet filed for bankruptcy on or about July 25, 2007. In August 2007, GM brought a motion in the bankruptcy proceeding for a declaration confirming the termination of the dealer agreement with Bay Chevrolet or some alternative relief.

30. As part of its justification in seeking termination of the dealer agreement, GM's motion stated the following:

> After the Debtor's [Bay Chevrolet] prolonged failure to pay its rent, its taxes or its other obligations in a timely manner, after its floor plan credit line had been suspended for well in excess of a year, after it failed to submit a financial statement to GM as required for over six months, after its operations had all but ceased, and after its efforts to sell its assets failed due to its own actions, GM took the entirely justified step of terminating the Dealer Agreement effective July 26, 2007 because of the dealership's obvious and paralyzing insolvency and its resulting inability to fulfill even the most basic obligations under its Dealer Agreement.

31. The GM motion confirmed that Bay Chevrolet was free to choose from a number of banks or other financing institutions for its floor plan arrangements, but that the company chose to use GMAC, a separate corporation in which GM maintains a minority ownership interest. As a part of the security for its floor plan arrangement, Bay Chevrolet granted GMAC an assignment in any proceeds from its open account with GM.[6]

32. According to the motion, GM terminated Bay Chevrolet's dealer agreement effective

---

[6] This open account appears to be in addition to the four accounts referenced in Finding of Fact 28.

July 26, 2007. The motion further stated that Bay Chevrolet did not challenge GM's grounds for such termination or otherwise seek to obtain any injunctive relief to prevent the termination from becoming effective. At no time during the hearing did petitioner introduce into evidence anything that would contradict the circumstances relied upon by GM for the termination of its dealer agreement, or the allegations set forth in the motion.

33. Petitioner's representative could not shed any light on the result of the motion filed by GM, and only offered that he believed that the bankruptcy proceedings were suspended.

34. Petitioner was granted permission by the Administrative Law Judge to submit post-hearing the financing agreements between Bay Chevrolet and GMAC. Petitioner did not submit any such financing agreements. In lieu thereof, petitioner obtained a 2012 wholesale electronic funds transfer (EFT) authorization, referred to by petitioner as a sweep arrangement between a current Hyundai dealership and Hyundai Capital America, Inc., a company that provides automobile and other financing arrangements to Hyundai dealerships. Petitioner believes this sweep arrangement is substantially similar to the sweep arrangement between Bay Chevrolet and GMAC discussed herein.

35. The Division has agreed to the abatement of all penalties in this matter.

36. Petitioner testified that when GMAC began to sweep Bay Chevrolet's general account, resulting in the dealership's partial payment and nonpayment of sales tax collected from customers, Bay Chevrolet's controller contacted the Division to suggest that the Division use dealership's assets (i.e., parts and vehicle inventory) to satisfy the liability. There is no evidence in the record that petitioner or any employee of Bay Chevrolet ever contacted GMAC in an effort to gain access to the sales tax collected from customers in order to pay such tax over to the Division. Nor is there any evidence in the record that petitioner or any employee of Bay

Chevrolet took any other affirmative steps to protect the sales taxes collected from customers.

37. As noted previously, in addition to the floor plan financing, GMAC provided working capital financing to Bay Chevrolet. When economic difficulties arose and GMAC began to exercise its rights under the sweep arrangement, it used funds swept from Bay Chevrolet's general account to pay down the working capital loan.

38. Bay Chevrolet made its final sales in June 2007.

39. The name of the Division's auditor, who testified at the hearing, appears on the CARTS documents submitted in evidence herein (***see*** Finding of Fact 15) as the "originating employee."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the relevant criteria for determining whether an individual is a person required to collect tax on behalf of a corporation and therefore personally liable for the sales tax obligations of that corporation. Applying such criteria to the present matter, the Administrative Law Judge determined that petitioner was a person required to collect tax on behalf of Bay Chevrolet and therefore personally liable for that entity's sales tax obligations. The Administrative Law Judge rejected petitioner's contention that, upon GMAC's exercise of its rights under the sweep arrangement, he lacked the requisite control over the affairs of Bay Chevrolet to be considered a responsible officer. Relying on our decision in ***Matter of Button*** (Tax Appeals Tribunal, January 28, 2002), the Administrative Law Judge noted that petitioner voluntarily entered into the arrangement with GMAC and therefore cannot use the arrangement to shield himself from sales tax liability arising as a consequence thereof.

With respect to the sales tax period ended August 31, 2006, the Administrative Law Judge determined that, even if he were found to be a responsible officer of Bay Chevrolet,

petitioner "cannot be held responsible for any amounts that might still be due" for that period. This conclusion was based on the consolidated statement of tax liabilities and the answer, both indicating full payment of this liability, and the lack of any explanation or reconciliation of the CARTS document showing a balance due for this period.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge erroneously determined that he was a responsible officer of Bay Chevrolet. Petitioner asserts that the taxes at issue herein accrued after GMAC began to take control under the sweep arrangement and that this fact distinguishes the present matter from ***Matter of Button***. Petitioner argues that other decisions of this Tribunal support his position that he lacked the requisite control over the affairs of Bay Chevrolet to be liable as a responsible officer.

Petitioner also argues that the Administrative Law Judge properly determined that he was not liable for any amounts that might still be due for the period ended August 31, 2006. Petitioner argues that the Administrative Law Judge found, as a matter of fact, that no balance was due from him for that period; that the record supports such a finding; and that, as a general principle, an administrative law judge's findings of fact are entitled to deference.

The Division asserts that the Administrative Law Judge properly determined that petitioner was a responsible officer of Bay Chevrolet. The Division argues that ***Matter of Button*** is controlling precedent with respect to the present matter and that other decisions cited by petitioner in support of his position are distinguishable. The Division also cites state and federal withholding tax cases in support of its position.

In support of its exception on the issue of petitioner's liability for the period ended

August 31, 2006, the Division asserts that petitioner has failed to meet his burden to prove that his sales tax liability for that period was satisfied by payment.

OPINION

For the reasons set forth herein, we affirm the determination of the Administrative Law Judge.

Tax Law § 1133 (a) imposes personal liability upon any person required to collect the tax imposed by Article 28 of the Tax Law 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 any requirement of Article 28 (Tax Law § 1131 [1]).

The Division's regulations impose trustee liability upon persons required to collect tax as follows: "Every person required to collect any tax imposed by article 28 . . . of the Tax Law acts as a trustee for and on account of the State with respect to taxes collected by such person" (20 NYCRR 532.2 [a]). Among other things, such trustees are required to "properly safeguard the interests of the State with regard to such taxes" and to "remit the taxes with timely filed returns" (20 NYCRR 532.2 [c] [3, 4]).

Petitioner bears the burden of proof to show, by clear and convincing evidence, that he was not a person required to collect tax under Tax Law §§ 1131 (1) and 1133 (a) (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

Whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (***Matter of Cohen v State Tax Commn.***, 128 AD2d 1022 [1987]). We look to

various factors in making this factual determination. The holding of corporate office is one such factor, but is not determinative (***see Chevlowe v. Koerner***, 95 Misc 2d 388 [1978]). "Generally, 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]). Other relevant factors include authority to hire and fire employees, authority to sign corporate checks and status as a stockholder (***see***, ***e.g.***, ***Matter of Ippolito v Commissioner of N.Y. Dept. of Taxation and Fin.***, 116 AD3d 1176 [2014]; ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990). "What must be considered is petitioner's authority and responsibility to exercise control over the corporation, not his actual assertion of such authority (citations omitted)" (***Matter of Coppola v Tax Appeals Trib. of State of N.Y.***, 37 AD3d 901 [2007]).

The facts in the present matter, viewed in light of these factors, strongly support the Administrative Law Judge's finding that petitioner was a responsible person pursuant to Tax Law § 1131 (1) and therefore personally liable for sales taxes due from Bay Chevrolet under Tax Law § 1133 (a). Specifically, petitioner was president of Bay Chevrolet and was in charge of the day-to-day management of the dealership throughout the entire period at issue. He thus oversaw all of the dealership's sales transactions pursuant to which the dealership collected sales tax from its customers. He signed checks and sales tax returns. He hired and fired employees. He had knowledge of and, at least until GMAC began to sweep the operating account, unquestioned control over its financial affairs. Additionally, with his 25% ownership interest, he had a substantial economic interest in the corporation.

While not conceding his liability as a responsible officer prior to GMAC's exercise of its

rights under the sweep arrangement, petitioner contends that, upon GMAC's exercise of such rights, he no longer had control over the corporation's finances and his check-signing authority and authority to pay creditors was under the direction and control of GMAC. Petitioner thus asserts that he was precluded from exercising his authority and, consequently, was not a responsible person at least as of the period commencing September 1, 2006.

We begin our analysis of petitioner's position by recognizing that Bay Chevrolet's economic difficulties were the root cause for its failure to remit sales tax collected from customers. Such economic difficulties led to GMAC's sweeping of the general account, which diverted the collected sales tax to other purposes. In our view, neither of these related causes for Bay Chevrolet's failure relieve petitioner from his duty as a responsible person to see that sales tax collected by the dealership was turned over to the Division.

It is well settled that economic difficulties do not excuse an individual from his or her responsibility to collect and remit sales tax on behalf of a corporation (***see Matter of Stafford***, Tax Appeals Tribunal, May 11, 1995). As to the sweep arrangement, a consequence of the dealership's economic problems, we have previously concluded that individuals may not continue to operate a business "at the expense of ensuring that sales tax was paid" (***see Matter of Napoli***, Tax Appeals Tribunal, July 13, 1995).[7] Here, the sweep arrangement had that very effect, as it allowed a creditor, GMAC, to divert collected sales taxes to pay other liabilities while the business continued to operate. We note further that petitioner voluntarily entered into the sweep arrangement on behalf of Bay Chevrolet and thereby "voluntarily created the scenario

[7] We have reached a similar conclusion with respect to withholding taxes (***see***, ***e.g.***, ***Matter of Anzilotti***, Tax Appeals Tribunal, February 22, 1996).

which led to [the dealership's] inability to pay . . . sales and use taxes" (***Matter of Button***).

The Administrative Law Judge relied primarily on our decision in ***Matter of Button*** in rejecting petitioner's claim that he was not a responsible person following the commencement of the sweep arrangement. Accordingly, in their briefs on exception, the parties argued extensively regarding the application of our decision in ***Button*** to the present matter.

In that case, a corporation voluntarily entered into a bank loan agreement, the terms of which gave the bank a security interest in the corporation's bank accounts. When the corporation defaulted on its obligations, the bank exercised its rights under the agreement to freeze all corporate bank accounts and to use the funds deposited therein to pay down the loan. This action resulted in the nonpayment of prepaid sales tax on cigarettes. It also effectively ended the corporation's business. In our decision holding two corporate officers personally liable under Tax Law § 1133 (a), we found it critical that "any preclusion from action by these petitioners was of their own creation, with full appreciation of the possible tax ramifications if the business operations failed." In other words, it was one of the "risks they chose to take in running their business enterprise."

Petitioner sees a factual distinction between ***Button*** and the present matter. He notes, correctly, that the taxes at issue in ***Button*** accrued before the creditor seized the corporate bank account while, here, most of the tax liability accrued after GMAC began to sweep the general account. In our view, however, the general principle underlying our decision in ***Button*** is applicable herein. That is, petitioner, like the officers in ***Button***, voluntarily entered into a financing agreement with a creditor, the terms of which allowed the creditor access to the corporation's bank account. In each case, when the corporation experienced financial

difficulties, the creditor exercised its rights under the financing agreement and collected what it was due directly from the bank account. In each case, the creditor's action resulted in the nonpayment of taxes. Given these common circumstances, we see no justification for drawing a line, as petitioner argues, between taxes accruing before a creditor takes action and taxes accruing after a creditor takes action. In each instance, any "preclusion from action" is the result of the officer's "own creation" and was a clearly foreseeable outcome in the event of economic difficulties.

The sweep arrangement in the present matter also may be viewed as a responsible officer's dereliction of duty. That is, petitioner, on behalf of the dealership, gave a creditor the authority to determine which corporate liabilities would be paid and to use trust fund taxes to pay such liabilities. Such a grant of authority was in direct contravention of petitioner's duty as a trustee to "properly safeguard the interests of the State with regard to such taxes" (20 NYCRR 532.2 [c] [3]). Petitioner's failure does not relieve him of responsibility, for "an officer cannot relieve himself of his responsibility for operating his corporation and expect that he will be relieved of sales tax liability" (***Matter of Napoli*** [citing ***Matter of Unger***, Tax Appeals Tribunal March 24, 1994, ***confirmed sub nom Matter of Landau v Tax Appeals Trib. of State of N.Y.***, 214 AD2d 857 [1995)], ***lv denied*** 86 NY2d 705 [1995]).

Kalb v. United States (505 F2d 506 [2d Cir 1974], ***cert denied*** 421 US 979 [1975]), a case involving officer liability for federal withholding taxes, is in accord with the foregoing discussion and thus provides additional persuasive support for a finding that petitioner remained

a responsible officer of the dealership following the commencement of the sweep arrangement.[8]

In ***Kalb***, corporate officers entered into an agreement with a bank pursuant to which the bank determined which liabilities of the corporation would be paid. The officers claimed that they included withholding taxes on the list of debts submitted for the bank's approval, but that the bank refused to approve payment. The court determined that the officers remained liable as responsible persons despite the agreement, noting that they "voluntarily entered into and at all times acceded to the arrangement" (505 F2d at 510). The court also noted that the officers "maintained legal control of the company, including the power to sign checks" (***id***.) and summarized its rationale as follows:

> "To permit corporate officers to escape liability . . . by entering into agreements which prefer other creditors to the government would defeat the entire purpose of the statute. As we have noted . . . withholding taxes are held in trust. We cannot imagine that in any other context a trustee could avoid his obligations by entering into an agreement by which funds entrusted to him are used to pay his other obligations. Similarly, we will not permit appellants so to escape their obligations here." (***Id.***)

Here, petitioner, like the officers in ***Kalb***, voluntarily entered into the agreement with GMAC and acceded to its terms at all times, notwithstanding his knowledge that, under the arrangement, GMAC was using sales taxes collected from customers for other purposes. We note that there is no evidence in the record that petitioner took any affirmative steps to ensure that the sales taxes collected by the dealership were paid over to the Division. We note further that, similar to the withholding taxes in ***Kalb***, the sales taxes herein were to be "held in trust for

---

[8] Federal cases examining officer liability for withholding taxes under Internal Revenue Code § 6672, such as ***Kalb***, may provide guidance for matters involving both Tax Law § 685 (g) (withholding tax) and § 1133 (a). The federal provision is the model for Tax Law § 685 (g) (***see Matter of Yellin v New York State Tax Commn***., 81 AD2d 196 [1981]) and the definition of "person" for purposes of Tax Law § 685 (g), found in Tax Law § 685 (n), is virtually identical to the definition of "person required to collect tax" in Tax Law § 1131 (1).

and on account of the State" (20 NYCRR 532.2 [b]). Finally, we note that it does not appear that GMAC ever took legal control of the dealership and that the power to sign checks remained with the dealership.

Petitioner seeks to distinguish ***Kalb*** from the instant matter because, as stated in the decision, the officers therein "were always free to rescind the agreement if it involved them in breaches of their duties [to withhold and pay over federal income taxes]" (***id***.). Petitioner asserts that he lacked the power to rescind the agreement with GMAC. We reject that assertion. The financing agreement between GMAC and the dealership, the agreement by which the dealership granted the creditor "sweep" rights, is not in the record.[9] The specific rights of the parties under the agreement are thus unknown. In the absence of the agreement itself, we find that petitioner has not shown that the terms of the sweep agreement precluded him from taking any action to fulfill his duty as a responsible person.

Petitioner also cites ***Chevlowe v Koerner***, 95 Misc 2d 388 [1978] and ***Matter of Stern*** (Tax Appeals Tribunal, September 1, 1988) in his brief on exception for the proposition that "an officer's control ceases to exist where third parties stop or prevent payment of the corporation's taxes, and that the officer therefore cannot be held personally liable for the unpaid taxes." Under this standard, petitioner argues that he lacked "the requisite control to be held personally liable for Bay Chevrolet's taxes" when GMAC began to sweep the general account.

We find that ***Chevlowe*** and ***Stern*** are factually distinguishable from the instant matter and therefore provide little support to petitioner's position. Specifically, unlike the present matter,

---

[9] Parenthetically, we note our agreement with the Administrative Law Judge's finding that the "substitute" sweep arrangement submitted post-hearing by petitioner was irrelevant (***see*** Finding of Fact 34).

neither of the officers in those cases created the impediment to the payment of the corporation's taxes. Here, petitioner's grant of authority to GMAC over the dealership's general account differentiates the instant matter from the cases cited by petitioner and places it within the rule of ***Button***.

In his reply to the Division's brief in opposition, petitioner also cites ***Matter of Muffoletto*** (Tax Appeals Tribunal, June 19, 1997) in support of his position. In that case, a responsible officer was assessed for withholding taxes due from a group of affiliated construction companies. The officer asserted that a surety had taken over the companies' funds and thus precluded him from paying withholding taxes. In our decision, this Tribunal found that the officer failed to prove that the surety did, in fact, take control of the companies. Petitioner notes the following language in our opinion:

> "While an otherwise responsible person may be relieved of the obligation to pay over withholding taxes where a surety takes control of the company's funds and precludes an otherwise responsible person from paying taxes when due, the Administrative Law Judge concluded that the key to such a result is establishing that the surety in fact took over control of the funds establishing the point in time at which such control was taken away from the otherwise responsible person. The Administrative Law Judge concluded that while Aetna did take over control of Mansfield's funds at some point, leaving petitioner unable to carry out his responsibility, petitioner failed to establish that this occurred prior to the latter part of June 1983 . . . . After thoroughly reviewing the evidence submitted by petitioner, we affirm the determination of the Administrative Law Judge. We agree with the Administrative Law Judge that petitioner did not meet his burden to show that Aetna exercised such control of the Mansfield corporations during the periods at issue that petitioner was precluded from collecting and paying over withholding tax."

Relying on the quoted passage, petitioner contends that this Tribunal's decision in ***Muffoletto*** affirmed the analysis in the Administrative Law Judge's determination and that, accordingly, our decision in ***Muffoletto*** holds that an otherwise responsible person is relieved of

responsibility when a third party, with whom the responsible officer voluntarily engaged, prevents the responsible officer from paying the taxes at issue.

We disagree. As noted above, our decision in ***Muffoletto*** held that the petitioner therein did not meet his burden to show that the surety exercised such control over the corporation that the petitioner was precluded from collecting and paying withholding tax. We did not address the ensuing consequences if that petitioner had met his burden. We note, however, that the authority for the Administrative Law Judge's proposition in ***Muffoletto*** that a responsible person may be relieved of the obligation to pay over withholding taxes where a surety takes control of the company's funds is ***US v Falino*** (441 F Supp 153 [EDNY 1977]) (***see Matter of Muffoletto***, Division of Tax Appeals, August 1, 1996). In that case, a general contractor's president was found not responsible for the payment of withholding taxes because a surety company had taken control of the general contractor's funds under the terms of a performance bond. The "crucial factor" in ***Falino***, however, was that the surety "assumed legal control over the corporation's funds" as a required signatory on all corporate checks and, as a result, "the corporation lacked the actual ability to pay the withholding taxes" (***Totaro v US***, 533 F Supp 71, 74 [DCNY 1981], ***affd*** 697 F2d 298 [1982]).

Here, petitioner has not shown that GMAC took legal control over the dealership's funds. As noted previously, the financing agreement between GMAC and the dealership is not in the record. Therefore, as also noted previously, the specific rights of the parties under the agreement are unknown. Additionally, there is no evidence that GMAC ever had check-signing authority for the dealership. Petitioner has thus failed to meet the standard for relief from liability under ***US v Falino***.

Accordingly, pursuant to the foregoing discussion, we reject petitioner's claim that GMAC's sweeping of the general account relieved him from his duty as a responsible person to see that sales tax collected by Bay Chevrolet was turned over to the Division.

Turning now to the Division's exception, there is no question that a presumption of correctness attaches to a notice of determination upon its issuance and that the petitioner bears the burden of proof to overcome a sales tax assessment (***see***, ***e.g.***, ***Matter of Darman Building Supply Corp***., Tax Appeals Tribunal, September 15, 2011, ***confirmed sub nom Matter of Darman Bldg. Supply Corp. v Mattox*** 106 AD3d 1150 [2013]).

The foregoing principles notwithstanding, the facts in this matter support a finding in favor of petitioner on this issue. Specifically, by its answer, the Division affirmatively stated that the notice of determination for the quarter ended August 31, 2006 had been fully paid by another party (***see*** Finding of Fact 14). This affirmative statement is consistent with the consolidated statement of tax liabilities dated May 15, 2009 (***see*** Finding of Fact 10). While the CARTS printout dated October 2, 2012 appears to indicate that a substantial balance remains due and owing for this quarter (***see*** Finding of Fact 15), the printout is unsupported by any testimony or other evidence. In the absence of any foundation for this evidence and the lack of any credible explanation for the balance due as indicated on the printout, we conclude that the CARTS document lacks probative value. We note that the CARTS printout is not a statutory notice and is therefore not entitled to a presumption of correctness.

We agree with petitioner that there is insufficient evidence in the record to show that the discrepancy resulted simply from the reversal of a payment by a third party as claimed by the Division on exception. Such a claim is inconsistent with the CARTS document itself, which

shows a partial payment of the assessment.

We further note that the name of the Division's witness at the hearing appears on the CARTS document as the "originating employee." This individual thus might have been in a position to explain the differences among the various documents submitted by the Division, but was not examined on that subject.

Accordingly, given the lack of any probative evidence to the contrary, we find, as a fact in this matter, consistent with the Division's answer and the consolidated statement of tax liabilities, that assessment number L-029928711 has been fully paid. Under such circumstances, the notice of determination bearing that assessment number must be canceled.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Patrick Kieran is denied;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is affirmed;

4. The petition of Patrick Kieran is granted to the extent indicated in Finding of Fact 35 and Conclusion of Law B of the Administrative Law Judge's determination, but is denied in all other respects;

5. The notices of estimated determination, dated May 5, 2008, bearing assessment numbers L-029928707, L-029928708, L-029928709 and L-029928710, modified as indicated in Findings of Fact 8 and 35 of the Administrative Law Judge's determination, are sustained; and

6. The notice of determination, dated May 5, 2008, bearing assessment number L-029928711, is canceled.

DATED: Albany, New York
November 13, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner