

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>JAMIE FRANKLIN</b>	:	DECISION
		DTA NO. 824910
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, 2008 through	:	
February 28, 2009.	:	
	:	

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Petitioner, Jamie Franklin, filed an exception to the determination of the Administrative Law Judge issued on June 12, 2014. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard in New York, New York, on November 19, 2014, which date began the six-month period for the issuance of this decision.

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

***ISSUES***

I. Whether petitioner is a person required to collect sales and use taxes on behalf of DHD Motors LLC, pursuant to Tax Law § 1131 (1) and, as such, is personally liable for such taxes pursuant to Tax Law § 1133 (a).

II. Whether penalties assessed against petitioner by the Division of Taxation should be abated.

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

We find the facts as determined by the Administrative Law Judge, except for findings of fact 4 and 5, which we have modified to more accurately reflect the record.<sup>1</sup> The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. The Division of Taxation (Division) issued three notices of determination, dated March 11, 2011, to petitioner, Jamie S. Franklin, as follows:

<b>Period Ended</b>	<b>Tax Assessed</b>	<b>Interest</b>	<b>Penalty</b>	<b>Assessment Payments/Credits</b>	<b>Total Due</b>
August 31, 2008	\$46,457.85	\$19,701.38	\$17,031.27	\$10,593.10	\$72,597.40
November 30, 2008	\$66,148.77	\$26,016.50	\$20,505.81	\$0.00	\$112,671.08
February 28, 2009	\$23,798.74	\$8,226.82	\$7,377.27	\$0.00	\$39,402.83

Each of the notices advised petitioner that he was liable as an officer or responsible person of DHD Motors, LLC (DHD). The business was located on Burnside Avenue, Lawrence, New York.

2. Petitioner joined DHD during or near February 2008. For the periods in issue, petitioner's share of DHD's profit, loss and capital was 22% as represented by a 2008 Schedule K-1 Form 1065, which designated petitioner as a "general partner or LLC member-manager" and "domestic partner." Petitioner's testimony confirmed that these facts are not in dispute.

3. On a day-to-day basis, petitioner worked as a sales manager in DHD's showroom, selling cars, making sure cars were prepared for customer delivery, and handling general oversight of the showroom floor. Petitioner's other three business partners, Michael DiSanti, Frank DiSanti and Ken Housner, would only spend about an hour or an hour and a half at DHD

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<sup>1</sup> We have also re-lettered the subparagraphs in Finding of Fact 12 for clarity.

on a daily basis, would sometimes meet in the owner's office or handle bank account transactions, but were not involved in automobile sales on a daily basis. The DiSantis and Mr. Housner were also partners in another business.

4. Petitioner and the other three partners were listed as signatories on two bank accounts with Astoria Federal Savings bank. The operating account signature card of DHD Motors LLC DBA Five Towns Kia, bearing an address of "679 Rockaway Tpke, Lawrence, NY 11559," was dated January 29, 2008. It bore a bank transaction stamp dated January 26, 2009, and a notation "transfer to cover overdrawn account," in an amount of \$160.31.

A second bank signature card was in the name of DHD Motors LLC Rockaway Mitsubishi, 179 N. Franklin St., Hempstead, NY 11096, and indicated it was for a payroll account. This signature card appears to be dated July 18, 2008,<sup>2</sup> and bore a bank transaction stamp dated January 26, 2009, which stated "deposit made to cover negative balance" along with an amount of \$1,260.39.

Both bank signature cards indicate that two authorized signatures were required on checks.

5. Wayne Dworkin, a sales manager for DHD,<sup>3</sup> commenced employment in April 2008. At the hearing, when asked who hired him, he testified: "Originally Mr. Franklin, and then I had to meet with the other partners." He answered to petitioner on a daily basis, and sought out

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<sup>2</sup> The signature card date is cut off such that the year reads "200." It is presumed to be 2008, since the bank transaction stamp is dated January 26, 2009, which it is assumed appeared at a later time, and the year 2008 corresponds to petitioner's employment with DHD.

<sup>3</sup> Mr. Dworkin's written statement referred to his employment by Five Towns Kia as a sales manager, but his testimony and a portion of the written statement referenced the business operations of DHD. It is presumed that DHD was doing business as Five Towns Kia, which is consistent with a notation on the Astoria Federal signature card for the operating account.

petitioner's advice on day-to-day business matters. If petitioner was unavailable, Mr. Dworkin would call one of the other partners with his questions.

6. Sometime during September 2008, petitioner traveled to Korea on business for five days to meet with the manufacturer of Kia. During that time, the other three partners entered the Kia dealership, removed the office records and transferred operations to their other store. Petitioner was under the impression at that time that the partners switched all the bank accounts to a different bank and closed the Astoria Federal accounts.

7. Mr. Dworkin was aware of petitioner's business trip to Korea. He recounted that the day after petitioner left for Korea, the other partners showed up at DHD. The partners met behind closed doors and a few days later, Mr. Dworkin was informed that everything handled from DHD's office would be sent to the "Mitzu" (presumably a reference to Mitsubishi) store in Hempstead, including any money collected, checks and credit card receipts, and all daily business transactions. The manner in which the business billed for what was going out remained the same. However, if a sales manager had a cancellation on a deposit, or any transactions that needed a refund, these would be handled by the "Mitzu" store.

8. A day or two before petitioner returned from his trip to Korea, Mr. Dworkin was told that his employment was terminated and he vacated the premises.

9. The sales tax return for the period ended August 31, 2008, and a notice and demand issued to DHD by the Division for the same period bore the address on North Franklin Avenue in Hempstead, New York, which was the same address on the payroll account bank signature card for DHD Motors LLC Rockaway Mitsubishi. The sales tax returns for the two later quarters in issue and two notices and demands that corresponded thereto bore a post office box address in Babylon, New York.

10. The sales tax returns filed by DHD for the periods in issue indicate that DHD was conducting business in Nassau, Rockland, Suffolk, and Westchester counties and New York City, which encompassed the counties of Bronx, Kings, New York, Queens and Richmond.

11. Petitioner left the employment of DHD around the end of December 2008, and was hired by East Hills Chevrolet on January 19, 2009.

12. The Division submitted the affidavit of Robert Bedard, a Tax Compliance Agent II in its Collections and Civil Enforcement Division, who has been employed with the Division for seven years. Mr. Bedard reviewed the Division's Case and Resource Tracking System (CARTS) with reference to the sales tax filings of DHD, and the notices issued to both the company and petitioner. These are Mr. Bedard's observations, based on CARTS:

Period ended August 31, 2008

a) On January 2, 2009, DHD filed a sales tax return for the quarter ended August 31, 2008 showing tax due of \$124,108.40, payments of \$77,650.55 and a balance due of \$46,457.85. When DHD failed to pay the \$46,457.85, the Division issued a notice and demand for payment of tax due,<sup>4</sup> assessment L-032357236, dated July 23, 2009, to DHD assessing the same amount of tax due, plus penalties and interest.

b) As of July 24, 2013, the tax due on assessment L-032357236 had been satisfied, but penalties of \$17,031.27 and interest of \$41,082.08 remained due.

c) The Division issued to petitioner, as a responsible officer, a notice of determination, assessment L-035513795, dated March 11, 2011, assessing tax due of \$46,457.85 plus penalties and interest for the period ended August 31, 2008. As of July 24, 2013, the penalties and interest in (b) above remained due from petitioner.

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<sup>4</sup> Mr. Bedard's affidavit incorrectly identified this document as a notice of determination. The record reflects the issuance of a notice and demand.

Period ended November 30, 2008

d) On December 11, 2009, DHD filed a sales tax return for the quarter ended November 30, 2008, indicating tax due in the amount of \$66,148.77, but failed to pay the amount due. When DHD failed to pay the \$66,148.77, the Division issued a notice and demand for payment of tax due,<sup>5</sup> assessment L-033136359, dated December 28, 2009, to DHD assessing the same amount of tax due, plus penalties and interest.

e) As of July 24, 2013, DHD had not paid any of the tax shown on the return; thus, the tax remained due, plus penalties and interest.

f) The Division issued to petitioner, as a responsible officer, a notice of determination, assessment L-035513794, dated March 11, 2011, assessing tax due in the amount of \$66,148.77, plus penalties and interest for the period ended November 30, 2008. As of July 24, 2013, the tax, penalties and interest shown in assessment L-035513794 remained due from petitioner.

Period ended February 28, 2009

g) On December 11, 2009, DHD filed a sales tax return for the quarter ended February 28, 2009, indicating tax due in the amount of \$23,798.74, but failed to pay the amount due. When DHD failed to pay the \$23,798.74, the Division issued a notice and demand for payment of tax due,<sup>6</sup> assessment L-033136360, dated December 28, 2009, to DHD assessing the same amount of tax due, plus penalties and interest.

h) As of July 24, 2013, DHD had not paid any of the tax shown on the return; thus, the tax remained due, plus penalties and interest.

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<sup>5</sup> Mr. Bedard's affidavit incorrectly identified this document as a notice of determination. The record reflects the issuance of a notice and demand.

<sup>6</sup> Mr. Bedard's affidavit incorrectly identified this document as a notice of determination. The record reflects the issuance of a notice and demand.

i) The Division issued to petitioner, as a responsible officer, a notice of determination, assessment L-035513793, dated March 11, 2011, assessing tax due in the amount of \$23,798.74, plus penalties and interest for the period ended February 28, 2009. As of July 24, 2013, the tax, penalties and interest shown in assessment L-035513793 remained due from petitioner.

13. The Division submitted a copy of a check into the record that was drawn on the account of DHD Motors, LLC DBA Rockaway Mitsubishi payroll account to William Long dated September 19, 2008. This check is signed by two individuals, one of whom is petitioner.

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

The Administrative Law Judge first addressed the issue of whether petitioner was a responsible person for the collection of sales taxes on behalf of DHD, noting that Tax Law § 1131 (1) imposes strict liability upon members of an LLC. However, she also noted that, under a Division technical memorandum (NY St Dept of Taxation & Fin Technical Memorandum TSB-M-11[17]S [2011] [“New Policy Relating to Responsible Person Liability Under the Sales Tax Law”]), a member of an LLC might be entitled to relief upon showing that his or her interest in the company and distributive share was less than 50%, and that he or she was not under a duty to act for the company in complying with the Tax Law.

The Administrative Law Judge found that petitioner failed to establish that he was not under a duty to act for DHD. While petitioner argued that he did not have managerial authority, such as the ability to hire and sign checks, the Administrative Law Judge found his testimony incredible because petitioner’s witness stated that he had been hired by petitioner, and the record included a check signed by petitioner on behalf of DHD. The Administrative Law Judge also noted that petitioner represented the company on a business trip to Korea, further indicating his authority within the company. Given the foregoing, the Administrative Law Judge found that

relief was not available for the periods ended August 31, 2008 and November 30, 2008, because petitioner failed to prove that he was not under a duty to act on behalf of DHD.

Regarding liability for the period ended February 28, 2009, the Administrative Law Judge observed that petitioner ended his employment with DHD in December 2008, and began working for a new company on January 19, 2009. However, the Administrative Law Judge found the record insufficient to prove that petitioner was not under a duty to act because petitioner did not offer into evidence the operating agreement or any other indicia that he had withdrawn his membership from DHD. Accordingly, the Administrative Law Judge determined that petitioner was not entitled to relief for this period.

On the issue of penalties, the Administrative Law Judge found that petitioner failed to introduce grounds for abatement. Specifically, the Administrative Law Judge found no merit to petitioner's argument that the other members thwarted his authority by moving the company records because petitioner continued working at DHD for three months after that event. As such, the Administrative Law Judge sustained the imposition of penalties.

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

Petitioner raises the same arguments as presented before the Administrative Law Judge. Relying upon facts presented at the hearing, petitioner argues that the Administrative Law Judge erred in finding that he was under a duty to act for DHD because he did not have sole decision-making authority for the company. Insofar as the Division relies upon a single check that he signed, petitioner argues that it was the only instrument that he signed and even that was countersigned by another member of DHD. Petitioner also notes that the three remaining partners closed the dealership in April 2009. Accordingly, petitioner argues that, as he meets the requirements under TSB-M-11(17)S for the entire period, he should be relieved of personal responsibility for the taxes incurred by DHD.

The Division argues that the Administrative Law Judge properly addressed the issues below. It notes that the Tax Law imposes per se liability upon members of an LLC. The Division agrees that its policy articulated in TSB-M-11(17)S is applicable under the instant facts and circumstances, noting in its letter brief that the Administrative Law Judge correctly found that the issue herein ultimately reduced to whether petitioner was a person under a duty to act for DHD with respect to its sales tax obligations. Regarding relief under its new policy, the Division argues that petitioner exhibited management authority through his signing of a check, his hiring of sales staff, and his business trip on behalf of the dealership. It contends that the Administrative Law Judge properly utilized these facts to determine that petitioner had a duty to act on behalf of DHD. Noting that the Administrative Law Judge found petitioner's testimony to be incredible, the Division contends that petitioner failed to present any evidence that he was thwarted from exercising his authority over the company. As such, the Division contends that the determination should be affirmed, and the notices sustained.

### ***OPINION***

Tax Law § 1133 (a) imposes personal responsibility for sales and use taxes upon all individuals that may be considered persons required to collect such taxes. The term "persons required to collect tax" includes "any member of a partnership or limited liability company" (Tax Law § 1131 [1]). As correctly noted by both the Administrative Law Judge and the Division, the Tax Law thus imposes strict or per se liability on members of partnerships and members of LLCs (*see Matter of Santo*, Tax Appeals Tribunal, December 23, 2009). Accordingly, as a member of DHD, an LLC, petitioner was personally liable for sales and use taxes due from DHD pursuant to Tax Law §§ 1133 (a) and 1131 (1).

Recognizing that this statutory scheme "can result in harsh consequences for certain partners and members who have no involvement in or control of the business's affairs," the

Division issued TSB-M-11(17)S to provide some relief to certain limited partners and certain LLC members. The Division's policy eliminates the collection of penalties from the eligible individual, and reduces liability relative to the percentage of profits or losses received by the eligible individual. In order for an LLC member to qualify for such relief, it must demonstrate that:

- (1) the member owns less than a 50% interest in the LLC; and
- (2) the member was not under a duty to act for the LLC in complying with the Tax Law.

With his 22% share of DHD's profits and losses, petitioner was potentially eligible for relief under the Division's policy as expressed in the technical memorandum. The Administrative Law Judge thus properly analyzed petitioner's liability herein under the "duty to act" standard (*see* Tax Law § 1131 [1]). The various factors relevant in reaching such a determination are well established:

"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])" (*Matter of Kieran*, Tax Appeals Tribunal, November 13, 2014).

We find that the Administrative Law Judge properly determined that petitioner failed to prove that he was not under a duty to act on behalf of DHD for the period June 1, 2008 through November 30, 2008. Our review of the record is thus in accord with the Administrative's Law

Judge's determination that petitioner played a significant role for DHD as sales manager. His duties included such managerial responsibilities as his role in the hiring of Mr. Dworkin; representing the company on a trip to Korea; and signing a check on behalf of the company. In reaching this conclusion, we note, as did the Administrative Law Judge, that the record in this matter is quite thin. Like the Administrative Law Judge, we particularly note that there is no evidence that petitioner was ever denied access to DHD's records, even after they were removed from the dealership premises (*cf., Matter of Stern*, Tax Appeals Tribunal, September 1, 1988). We further note our deference to the Administrative Law Judge's characterization of petitioner's credibility as "questionable" (*cf., Matter of Constantino* [Tribunal's conclusion that petitioner was not a responsible officer rests on petitioner's "credible testimony" that he lacked authority to take action with respect to the financial and managerial activities of the corporation]).

Accordingly, as a person under a duty to act, petitioner was not eligible for the relief afforded under TSB-M-11(17)S for the period June 1, 2008 through November 30, 2008. He thus remained personally liable for the full amount of sales tax due from DHD for that period.

Petitioner's circumstances changed, however, when he ceased employment at DHD at the end of December 2008 (*see* Finding of Fact 11). At that point, other than his minority ownership interest, the various factors indicative of petitioner's duty to act, such as managerial responsibilities, authority with regard to hiring, and check-signing authority, were no longer present. We thus find, contrary to the Administrative Law Judge's conclusion, that petitioner was no longer under a duty to act for DHD in respect of its sales tax obligations for the period ended February 28, 2009. At the same time, however, we agree with the Administrative Law Judge's finding that, in the absence of evidence to the contrary, petitioner remained a member of the LLC through the balance of the period at issue, i.e., through February 28, 2009. These circumstances fall within the ambit of TSB-M-11(17)S, and pro-rated relief under that technical memorandum is

appropriate. Accordingly, the Division is ordered recompute petitioner's liability for the period December 1, 2008 through February 28, 2009, by granting relief under TSB-M-11(17)S, consistent with his 22% ownership interest, for that period.

Regarding the issue of penalties, the taxpayer seeking abatement faces an onerous task in establishing that the nonpayment was due to reasonable cause and not willful neglect (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). We agree with the Administrative Law Judge that the record lacks any basis for modifying the assertion of penalties for the period June 1, 2008 through November 30, 2008. With respect to the period December 1, 2008 through February 28, 2009, we note that relief under TSB-M-11(17)S includes abatement of penalty.

Finally, we note that petitioner sought to introduce additional evidence pertaining to his address with his reply brief. By letter, dated September 23, 2014, we advised petitioner that we would not consider such evidence in rendering our decision because the record was closed at the hearing. Accepting evidence after the record is closed is inconsistent with a fair and efficient hearing process, and also deprives the adversary of an opportunity to question the evidence on the record (*see e.g. Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *affd sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation & Fin.*, 116 AD3d 1176 [2014]). As such, in accordance with our longstanding policy against considering evidence submitted after the close of the record (*see e.g. Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991), we reject petitioner's additional evidence.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jamie Franklin is granted to the extent provided below, but is otherwise denied;

(a) the notice of determination for the period ended February 28, 2009 (L-035513793) is modified by granting relief under TSB-M-11(17)S, consistent with petitioner's 22% ownership interest, for that period, b but is sustained in all other respects;

2. The determination of the Administrative Law Judge is modified to the extent provided in paragraph 1, but is affirmed in all other respects;

3. The petition of Jamie Franklin is granted to the extent provided in paragraph 1, but is denied in all other respects;

4. The notice of determination for the period ended August 31, 2008 (L-035513795), as modified pursuant to Finding of Fact 12 (c), is sustained;

5. The notice of determination for the period ended November 30, 2008 (L-035513794) is sustained; and

6. The notice of determination for the period ended February 28, 2009 (L-035513793), as modified pursuant to paragraph 1, is sustained.

DATED: Albany, New York  
May 14, 2015

/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