STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SUSAN SACHER	:	DETERMINATION DTA NO. 824107
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, 1998 through February 28, 1999 and September 1, 2001 through November 30, 2001.	:	

Petitioner, Susan Sacher, 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, 1998 through February 28, 1999 and September 1, 2001 through November 30, 2001.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Agency Building #1, Empire State Plaza, Albany, New York 12223, on March 15, 2013 at 11:00 A.M., with all briefs to be submitted by August 23, 2013, which date commenced the six-month period for issuance of this determination. Petitioner appeared by her spouse, Joel Sacher, at the hearing and by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel) on the brief. The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

ISSUE

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

II. Whether Susan Sacher was a person responsible for the collection and payment of sales and use taxes on behalf of BMW NY, Inc., within the meaning and intent of Tax Law § 1131(1) and § 1133(a).

FINDINGS OF FACT

1. BMW NY, Inc. (BMW NY), owned and operated BMW motorcycle franchises at 508 New York Avenue, Huntington, New York, and 401 Wall Street, New York, New York, during the period March 1, 1998 through February 28, 2006. Following the audit period, the corporation changed its name to Cybercycling Distributing, Inc., when the franchisor, BMW of North America, Inc., revoked the franchise agreement with BMW NY.

2. On December 10, 2003, the Division of Taxation (Division) sent a letter to the corporation stating that the business's sales and use tax records had been scheduled for a field audit for the period March 1, 1998 through November 30, 2000, and March 1, 2001 through November 30, 2003. The period December 1, 2000 through February 28, 2001 was not included in the audit because a sales tax return had been filed by the corporation for that sales tax quarter, thus rendering the quarter outside the statute of limitations for audit purposes. 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 January 7, 2004. A schedule of books and records to be produced was attached to the letter. The letter specifically requested among other records, federal income tax returns, the general ledger, sales invoices, merchandise purchase invoices, cash register tapes and bank statements for the entire audit period. In response to the appointment letter, the corporation advised the auditor to contact its representative to commence the audit. At the initial meeting with the corporation's representative, no books and records were provided except a few pages from a "police book." A

police book is required to be maintained by dealerships that sell used vehicles, and is a record of all vehicles brought to the dealership's facilities for resale. It is a record used by the police to check for stolen vehicles. From the pages of the police book, the auditor was able to obtain the facility number of the dealership. The facility number is issued by the Department of Motor Vehicles (DMV) in conjunction with its issuance of Retail Certificate of Sale forms (MV-50 books). The MV-50 book is the actual record of sales by a dealer. When a dealer sells a vehicle a portion of the MV-50 provides a temporary certificate of registration to the purchaser. The name and address of the purchaser as well as the purchase price of the vehicle is contained on the MV-50.

3. On December 28, 2004, by letter to BMW NY's representative, the audit period was expanded to include the period December 1, 2003 through November 30, 2004. The Division again requested that the corporation produce all books and records relating to the expanded audit period and included a second records request list. The letter specifically requested among other records, federal income tax returns, sales invoices, merchandise purchase invoices, bank statements and Department of Motor Vehicles forms MV-50, Retail Certificate of Sale, for the entire audit period. On March 24, 2006, by letter to BMW NY's representative, the audit period was expanded to include the period December 1, 2004 through February 28, 2006. The Division again requested that the corporation produce all books and records relating to the expanded audit period and included a third records request list. The letter specifically requested among other records, federal income tax returns, New York State corporation tax returns, sales invoices, merchandise purchase invoices and bank statements for the entire audit period.

4. In addition to the pages of the police book, the corporation produced income statements for only some of the years at issue, some copies of late-filed income and sales tax

returns and some warranty sales information. The Division concluded that the records produced in response to its requests were inadequate for the purpose of verifying the corporation's tax liability with respect to sales. The Division determined that the lack of original source documents detailing the corporation'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 inadequate records, the auditor decided to employ an indirect audit method to calculate the amount of taxable sales.

5. Using the dealership's facility number, the auditor obtained from the Department of Motor Vehicles the certificate of sale forms relating to the dealership for a two-year period. These records were initially transcribed for a two-month test period and resulted in a tax discrepancy of approximately one million dollars when compared to tax reported by the corporation. The auditor decided to transcribe all the MV-50 forms received. The transcription included the customer name and address, invoice date, invoice amount, jurisdiction, tax rate, tax paid, license plate number and additional tax due. The taxability of the transaction was based on the purchaser being a New York State resident and the amount of tax due was determined by each New York purchaser's address. The auditor employed the form MV-50s to compute an overall percentage of nontaxable sales (generally, out-of-state sales) of 14.70 percent. Audited gross sales were estimated using federal tax returns, New York State corporate tax returns and income statements provided by the corporation. Audited gross sales were reduced by warranty sales to determine motorcycle sales. The taxable ratio was applied to motorcycle sales to determine quarterly taxable sales. Reported taxable sales were subtracted from quarterly taxable sales to arrive at additional taxable sales of $17,705,037.91 and additional tax due of $1,484,390.28.

6. The corporation executed a series of consents extending the period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law that collectively extended the period in which to assess sales and use taxes due for the period March 1, 2000 through February 29, 2004 to March 20, 2007. Joel Sacher signed ten of the eleven consents as president of the corporation. The remaining consent was signed by the corporation's representative.

7. On November 8, 2006, the corporation executed a Closing Agreement for the periods March 1, 1998 through November 30, 2000, and March 1, 2001 through February 28, 2006, fixing the additional tax due at $1,484,390.28, plus penalty and interest. The agreement was executed by Joel Sacher, as president, on behalf of the corporation.

8. Petitioner executed a series of consents extending the period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law that collectively extended the period in which to assess sales and use taxes due for the period December 1, 2002 through February 29, 2004 to March 20, 2007.

9. On November 9, 2006, petitioner executed a Closing Agreement for the periods March 1, 1998 through August 31, 1998, March 1, 1999 through February 29, 2000 and December 1, 2002 through February 28, 2006, fixing the additional tax due at $989,316.60, plus interest. Petitioner paid this amount to the Division. The agreement provides that petitioner is deemed to be a responsible person of BMW NY under Tax Law § 1131(1), and pursuant to section 1133(a) of the Tax Law, is personally liable for the taxes due from the corporation.

10. On November 9, 2006, petitioner executed a separate agreement for the periods September 1, 1998 through February 28, 1999, and September 1, 2001 through November 30, 2001, in which petitioner agreed that payment for these periods would be received by the

Division by July 31, 2009, and if payment was not received, the Division could determine petitioner's liability at that time.

11. On August 31, 2009, the Division issued a Notice of Determination (L-032448216-2) to petitioner as an officer or responsible person of the corporation, asserting sales and use taxes due for the period September 1, 1998 through February 28, 1999, in the amount $109,952.24, plus penalty and interest. On the same date, the Division issued a second Notice of Determination (L-032448215-3) to petitioner as an officer or responsible person of the corporation, asserting sales and use taxes due for the period September 1, 2001 through November 31, 2001, in the amount $76,673.83, plus penalty and interest.

12. Petitioner received wage and tax statements, form W-2, from BMW NY for the years 2002 and 2003. For each year petitioner was paid a salary of $35,464.00. According to Mr. Sacher, the wages were actually his wages paid to his wife to avoid creditors.

13. A corporate resolution of the corporation certified North Fork Bank as a depository of BMW NY. Withdrawals from the business account on behalf of the corporation were authorized to be made by either the president or secretary of the corporation. The resolution lists Joel Sacher as the corporation's president and secretary, and is dated June 27, 1996. A North Fork Bank signature card for a second business checking account of the corporation indicates petitioner, as vice-president, to be a signatory for the corporation. Petitioner, as secretary of BMW NY, appears as a signatory on a third business account, this one with Citibank. Joel Sacher, as president, is also listed as a signatory on the signature card. The account was opened on July 26, 1999 and contained an initial deposit of $250.00. Petitioner and Joel Sacher were listed as signatories on a business checking account for the corporation with Citibank.

14. Due to extensive business losses and, as a result, a poor credit rating, Mr. Sacher, at the insistence of BMW of North America, needed petitioner's personal guaranty to obtain the BMW motorcycle franchise. In addition, BMW of North America required petitioner's signature as an officer of BMW NY for the corporation's guaranty. On October 17, 1996, petitioner and Joel Sacher signed personal guaranties for the indebtedness of the corporation to BMW of North America. Petitioner, as secretary of the corporation, executed the corporation's guaranty for any indebtedness to BMW of North America. Petitioner was the sole responsible corporate officer to sign on behalf of BMW NY. Petitioner secured the necessary credit on behalf of her husband that was a requirement of BMW of North America to grant Mr. Sacher the motorcycle dealership. Without petitioner's guaranties, Mr. Sacher would have been unable to obtain the dealership. Petitioner was aware that by signing the franchise agreement and personal and corporate guaranties she was responsible for the debts of BMW NY. A Termination, Release and Settlement Agreement between BMW NY and BMW of North America was executed on October 11, 2005 on behalf of the corporation by Joel Sacher, as president, and petitioner, as a principal of BMW NY.

15. Mr. Sacher oversaw the day-to-day operations of BMW NY's two dealerships. Each dealership had a general manager hired by Mr. Sacher. Mr. Sacher was responsible for preparing or supervising the preparation of sales tax returns, made significant business decisions, was responsible for maintaining and managing the business and owned one hundred percent of the corporate voting stock. Mr. Sacher had the authority to manage the business with knowledge and control over the financial affairs of the business; pay or direct payments of liability; sign checks; act on behalf of the business; sign consents extending periods of limitation; sign the sales and use tax returns; hire and fire employees; negotiate loans; borrow money or guarantee business loans.

16. During the period at issue, and beginning in 1996, petitioner operated two businesses. Mrs. Sacher was a licensed real insurance agent and did business under the corporate name Motortrans, Ltd. Petitioner started the business with the assistance of Mr. Sacher, having office space in the BMW NY dealership in Huntington, New York. Customers of BMW NY were referred to petitioner for insurance on their motorcycles. In 1996, she began importing motor scooters into the United States from Italy. Mrs. Sacher incorporated under the name "Italjet, Inc." As a wholesale business, Italjet, Inc., imported the motor scooters into the United States from Italy and signed up dealerships throughout the country to sell the scooters. To assist petitioner in the start-up of her business, BMW NY was the first dealership signed to sell the scooters and space was provided in the Manhattan location to display them. In addition, Italjet, Inc., had office space adjacent to the BMW NY dealership in Manhattan.

17. Petitioner had little or no involvement with the affairs of the corporation. She did not sign the sales tax returns or pay the sales tax liability for the periods at issue.

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 § 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).

C. 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).

D. In this case, the record establishes the Division's clear and unequivocal written request for books and records of the corporation's sales, as well as its failure to produce such books and records. Based on the total lack of records provided, the Division reasonably concluded that BMW NY did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period including, most tellingly, any

records of sales. Having established the unavailability of required books and records, the Division was clearly entitled to resort to the use of indirect method.

The only records presented by the corporation were income statements for some of the years at issue, a few pages of the police book, some late-filed income and sales tax returns and some warranty sales information. These documents were 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 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]). Furthermore, the use of Department of Motor Vehicles form MV-50 has been determined to be a reasonable means in the absence of books and records to determine additional taxable sales (***Matter of Anthony***, Tax Appeals Tribunal, November 30, 1995 [auditor relied on MV-50s to determine additional taxable sales and additional tax due]; ***Matter of Pasquarella***, Tax Appeals Tribunal, July 18, 1991 [auditor relied on MV-50s to conclude underreporting of taxable sales]).

In view of the foregoing, the only questions presented in this case are whether petitioner has established that the audit method employed was unreasonable and 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]).

E. Petitioner has not established that the audit method was unreasonable or that the amount of tax determined by application of such method was erroneous. For the period in question, the corporation did not maintain any records of sales as required by the Tax Law. The corporation presented no invoices, Department of Motor Vehicles Certificate of Sale forms or other source documentation that could be used to establish the correct amount of sales tax due. 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***). Petitioner presented no evidence to show that the method utilized by the Division was unreasonable. Under these circumstances, the Division's resort to the use of the information contained on the MV-50 forms filed by the corporation with the Department of Motor Vehicles to determine sales for the audit period was entirely reasonable (***cf. Matter of Fokos Lounge, Inc.***, Tax Appeals Tribunal, March 7, 1991 [where taxpayer proved through an expert witness that the utilities factor was without a rational basis as applied to its business]). Furthermore, 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***).

F. 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 shall include a true 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].)

G. 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]).

H. 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 sub nom Matter of Landau v. Tax Appeals Tribunal,*** 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, 559 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, December 28, 1989]; ***Matter of William F. Martin***, ***supra***; ***Matter of Autex***, ***supra***).

I. 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 "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).

J. Petitioner's claim that she was not an officer or employee of BMW NY is not supported by the record. Petitioner signed both a personal guaranty and, as secretary of BMW NY, the corporation's guaranty for any indebtedness of the corporation to BMW of North America. She was the only officer to sign on behalf of the corporation. Petitioner secured the credit required by BMW of North America to grant Mr. Sacher the motorcycle franchise. Petitioner was aware that by signing the franchise agreement and personal and corporate

guaranties she became responsible for the debts of BMW NY. Without her signatures on the franchise agreement and guaranties, BMW NY would have been unable to obtain the motorcycle franchise with BMW of North America. In addition, petitioner was listed on various bank accounts of the corporation as an officer. Petitioner, with knowledge of the consequences, held herself out to BMW of North America and the various banks as a corporate officer. Under these circumstances, petitioner cannot now claim that she was not an officer of BMW NY.

K. Even were it determined that petitioner was not an officer or employee, she could still be found liable for the sales and use taxes assessed against BMW NY. In ***Matter of Ianniello*** (Tax Appeals Tribunal, November 25, 1992, ***confirmed*** 209 AD2d 740 [1994]), petitioners were neither officers, directors nor employees of the company against which tax was assessed. It is clear that Tax Law § 1131(1) does not bear an exclusive list of those persons who may be held liable for the collection of tax. It was determined in ***Matter of Ianniello*** that the petitioners could be personally liable. In the federal case of ***United States v. Graham***, the question was whether a member of a corporation's board of directors could be considered a "person" required to collect tax when that member was not an employee or officer of the corporation (***United States v. Graham***, 309 F2d 210 [1962]). The court, interpreting language in the Internal Revenue Code [26 USC § 6671[b]; § 6672] which is similar to Tax Law § 1131(1), held that "[t]he term 'person' [under the statute] does include officer and employee, but certainly does not exclude all others" (***Id.*** at 212). The court in ***Graham*** concluded that a contrary conclusion would be too narrow a reading of the section, and that "[t]he statute's purpose is to permit the taxing authority to reach those responsible for the corporation's failure to pay the taxes which are owing" (***Id.***; ***see also Matter of Luongo***, Tax Appeals Tribunal, July 10, 2012; ***Matter of Tafeen***, Tax Appeals Tribunal, January 3, 2002).

L. The principal argument advanced by Mrs. Sacher is that she had little or no involvement with the operation of BMW NY, that she had nothing to do with the daily operations of the business and exercised no authority over such operations. According to petitioner, it was her husband, Mr. Sacher, who ran and controlled the business operation, and therefore she is not responsible for the unpaid sales tax determined to be due. Initially, it is noted that even accepting her argument that her husband should be held responsible, the same would not excuse petitioner from responsibility, for liability with respect to sales taxes is joint and several (***see Matter of Tafeen***; ***Matter of Phillips***, Tax Appeals Tribunal, May 11, 1995; Tax Law § 1133[a]).

M. In order to prevail in this matter, petitioner was required to establish by clear and convincing evidence that notwithstanding her status as an officer, her check-signing authority, her authority to withdraw corporate funds, her receipt of wages, her guaranty of the franchise agreement both individually and on behalf of the corporation, providing her with sufficient authority over BMW NY's operation, she was nonetheless thwarted by others in carrying out her corporate duties *through no fault of her own* (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998). In addition, it is noted that for the periods both before and after the periods at issue herein, petitioner admitted to being a responsible officer or person of the corporation and paid $989,316.60 in sales tax determined to be due on audit. Upon review of the entire record, it becomes clear that petitioner has not met this standard and was properly held liable for the sales tax obligations of BMW NY for the remaining periods at issue.

N. Petitioner received the benefit of the corporation's profits, in the form of payment of her salary for at least two years. More importantly, Mrs. Sacher started two new businesses (Motortrans, Ltd., and Italjet, Inc.) that directly benefitted from the existence of BMW NY.

Petitioner had a presence at both locations of BMW NY. Her insurance business maintained office space at the Huntington, New York, dealership where customers of BMW NY were referred to her business for insurance on their motorcycles. At the New York location, her motor scooter import business had an office adjacent to the motorcycle dealership. BMW NY was the first dealership signed to sell her scooters and also provided space for her to display them. While claiming that she knew nothing about BMW NY's's daily operations the fact remains that petitioner, as individual and corporate guarantor and officer, with check signing authority, was under an obligation to assure that tax was remitted, and she should have made inquiries as to tax compliance. Petitioner, however, chose not to inquire and simply to abdicate her responsibilities. She abdicated her responsibilities to her husband, an individual with a history of extensive business losses and poor credit. The record contains no evidence of any restrictions on Mrs. Sacher's ability or authority to inspect the corporate books and records. Rather, she simply never asked to do so. In fact, there is no evidence that Mrs. Sacher ever made any inquiries as to the business operation of BMW NY.

O. While Mrs. Sacher chose to be uninvolved in BMW NY's daily operations, and not to inquire about its ongoing business operations, the fact remains that she had no lack of actual authority over the affairs of the corporation. There is no evidence that she was in any manner overtly restricted, limited or precluded from overseeing BMW NY's affairs and assuring that taxes were being remitted, other than as a direct result of the manner in which she chose to be uninvolved in the business. The record reveals no physical or legal impediment to inquiring or acting, nor of being deliberately misled, lied to or thwarted in the face of any inquiries or other efforts to assure compliance with the corporation's tax obligations. Simply put, the record does not support the conclusion that petitioner did not have or could not have exercised sufficient

authority and control over corporate affairs to assure that sales tax was collected and remitted. (***Matter of Goodfriend; see Matter of Shah***, Tax Appeals Tribunal, February 25, 1999). Mrs. Sacher's total delegation to her husband, in light of her holding herself out as a principal in the corporation to BMW of North America and various banks and her knowledge of her husband's past financial difficulties, was not a reasonable delegation of her responsibilities. Accordingly, petitioner was properly held responsible for BMW NY's sales tax payment obligations with regard to the corporation's nonpayment of sales taxes for the quarterly periods in issue.

P. The petition of Susan Sacher is denied and the two notices of determination, dated August 31, 2009, are sustained.

DATED: Albany, New York
January 16, 2014

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE