STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMIE FRANKLIN	:	DETERMINATION 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.	:	

Petitioner, Jamie Franklin, 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 period June 1, 2008 through February 28, 2009.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, in New York, New York, on August 6, 2013 at 10:30 A.M., with all briefs due in this matter by December 13, 2013, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

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

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

Period Ended	Tax Assessed	Interest	Penalty	Assessment Payments/Credits	Total Due
08-31-08	$46,457.85	$19,701.38	$17,031.27	$10,593.10	$72,597.40
11-30-08	$66,148.77	$26,016.50	$20,505.81	0.00	$112,671.08
02-28-09	$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 from 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 on a daily basis, 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,[1] 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.

5. Wayne Dworkin, a sales manager for DHD,[2] was hired by petitioner and commenced employment with DHD in April 2008. He later met with the other three owners of the business, but on a daily basis answered to petitioner, and sought out 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.

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[1] 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.

[2] 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 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 his employment was terminated and he vacated the premises.

9. The sales tax return for the period ending 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 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 ending August 31, 2008

a) On January 2, 2009, DHD filed a sales tax return for the quarter ending 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,[3] 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 ending August 31, 2008. As of July 24, 2013, the penalties and interest in (b) above remained due from petitioner.

Period ending November 30, 2008

a) On December 11, 2009, DHD filed a sales tax return for the quarter ending 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

[3] Mr. Bedard's affidavit incorrectly identified this document as a Notice of Determination. The record reflects the issuance of a Notice and Demand.

of Tax Due,[4] Assessment L-033136359, dated December 28, 2009, to DHD assessing the same amount of tax due, plus penalties and interest.

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

c) 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 ending November 30, 2008. As of July 24, 2013, the tax, penalties and interest shown in Assessment L-035513794 remained due from petitioner.

Period ending February 28, 2009

a) On December 11, 2009, DHD filed a sales tax return for the quarter ending 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,[5] Assessment L-033136360, dated December 28, 2009, to DHD assessing the same amount of tax due, plus penalties and interest.

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

c) 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 ending February 28, 2009. As of July 24, 2013, the tax, penalties and interest shown in Assessment L-035513793 remained due from petitioner.

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[4] Mr. Bedard's affidavit incorrectly identified this document as a Notice of Determination. The record reflects the issuance of a Notice and Demand.

[5] Mr. Bedard's affidavit incorrectly identified this document as a Notice of Determination. The record reflects the issuance of a Notice and Demand.

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.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner asserts that he should be granted relief from responsible person liability since he was a less than 50% owner of DHD and not under a duty to act on behalf of the company, relying on a Technical Services Bureau Memorandum (TSB-M-11[17]S).

15. The Division maintains that as a member of an LLC, petitioner is subject to per se liability for the company's sales tax due. Applying the principles of TSB-M-11(17)S, the Division argues that "any general partners of a partnership" are excluded from the relief sought by petitioner, and since he is a general partner of DHD, petitioner does not qualify. Alternatively, the Division asserts that even if petitioner qualified for relief, he would still be responsible for the taxes of the LLC since he had a duty to act on behalf of the LLC with respect to collection and payment of its taxes. Lastly, the Division maintains that petitioner has not shown evidence of reasonable cause for the failure to pay DHD's sales tax, and thus, penalties should not be abated.

CONCLUSIONS OF LAW

A. A New York limited liability company (LLC) is "an unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business, other than a partnership or a trust" (Limited Liability Company Law [LLCL] § 102[m]). Tax Law § 2(6) provides that for purposes of the Tax Law, a partnership includes, "but shall not be limited to, a limited liability company and a member thereof, respectively." Thus, when a company is formed as a limited liability company in accordance with the LLCL, it is treated as a

partnership for purposes of the Tax Law, unless it specifically elects to be taxed as a corporation (Treas Reg § 301.7701-3).

B. A "member" of an LLC is a person who has been admitted as a member in accordance with the terms and provisions of LLCL Article 1 and the operating agreement, and has a membership interest in an LLC with the rights, obligations, preferences and limitations specified thereunder (LLCL § 102[q]). A "membership interest" is the member's aggregate rights in an LLC, including, without limitation: (i) the member's right to a share of the profits and losses of the LLC; (ii) the member's right to receive distributions from the LLC; and (iii) the member's right to vote and participate in the management of the LLC (LLCL § 102[r]).

C. LLCL § 606(a) sets forth the premise for withdrawal of a member, as follows:

> A member may withdraw as a member of a limited liability company only at the time or upon the happening of events specified in the operating agreement and in accordance with the operating agreement. Notwithstanding anything to the contrary under applicable law, unless an operating agreement provides otherwise, a member may not withdraw from a limited liability company prior to the dissolution and winding up of the limited liability company. Notwithstanding anything to the contrary under applicable law, an operating agreement may provide that a membership interest may not be assigned prior to the dissolution and winding up of the limited liability company.

D. Tax Law § 1133(a) provides that "every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article."

E. Tax Law § 1131(1) defines a person required to collect tax imposed by Article 28 as including:

> any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual

> proprietorship in complying with any requirement of this article; *and any member of a partnership or limited liability company*. (Emphasis added.)

F. The Tax Law contains no factors to qualify or limit the liability imposed upon members of partnerships or limited liability companies. As the Tax Appeals Tribunal stated in a decision affirming a determination finding a partner to be a responsible person under the statute:

> the Administrative Law Judge noted that section 1131(1) of the Tax Law imposes per se liability on 'any member of a partnership' regardless of the partner's involvement in the operation and management of the business without making any distinction between general and limited partners. . . . We agree with these conclusions of the Administrative Law Judge (***Matter of Bartolomei***, Tax Appeals Tribunal, April 3, 1997).

Similarly, in ***Matter of Santo*** (Tax Appeals Tribunal, December 23, 2009), the Tribunal stated:

> Where petitioner is an employee or manager of a partnership or limited liability company, the Division would be required to show, as a condition precedent to finding personal liability, evidence not just of petitioner's status as a employee or manager, but that he had a duty to act for the company in the collection and payment of sales tax to the State of New York (***see***, Tax Law §§ 1131[1]; 1133[a]). Since Tax Law § 1131(1) imposes strict liability upon members of a partnership or limited liability company, all that is required to be shown by the Division for liability to obtain is the person's status as a member.

G. Although the operating agreement of DHD was not introduced into evidence, the testimony of petitioner, supported by the 2008 Schedule K-1 of DHD, established that petitioner was an LLC member of DHD with a membership interest in profits, losses and capital in the amount of 22% during the sales tax quarters in question. Clearly, the application of Tax Law § 1131(1) and § 1133(a) inasmuch as they apply to petitioner as an LLC member, results in strict liability for the sales tax liability of DHD (***Matter of Santo***). Notwithstanding the foregoing, by a technical memorandum dated September 19, 2011, the Division adopted a policy that provides limited relief for certain LLC members (***see*** TSB-M-11[17]S). It provides, in pertinent part:

> Under the department's new policy, the following limited partners and LLC members who are responsible persons under section 1131(1) may be eligible for relief:
>
> * * *
>
> LLC members who can document that their ownership interest and percentage distributive share of the profits and losses of the LLC are each less than 50% may be approved for relief if they demonstrate that they were not *under a duty to act* on behalf of the company in complying with the Tax Law (emphasis added).

H. 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]). The issue of whether petitioner had a duty to act for the LLC with respect to the collection and payment of taxes depends upon the particular facts of each case (***Matter of Cohen v. State Tax Commn***., 128 AD2d 1022, 513 NYS2d 564 [1987]; ***Matter of Hall*****,** Tax Appeals Tribunal, March 22, 1990**,** ***confirmed*** 176 AD2d 1006, 574 NYS2d 862 [1991]; ***Matter of Martin****,* Tax Appeals Tribunal, July 20, 1989*,* ***confirmed*** 162 AD2d 890, 558 NYS2d 239 [1990]; ***Matter of Autex Corp***., Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether a person is authorized to sign the corporation's tax returns, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

The question to be resolved in an analysis of whether a person is a responsible officer or employee is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered responsible under the Tax Law, and thus had the duty to act for the corporation. The same principles are applied to these facts. 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 interests in the corporation (***Matter of Cohen v. State Tax Commn.***, 128 AD2d at 1023 513 NYS2d at 565 [1987]; ***Matter of Blodnick v. State Tax Commn.***, 124 AD2d 437, 507 NYS2d 536, 538, ***appeal dismissed*** 69 NY2d 822, 513 NYS2d 1027 [1987]; ***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 Barton***, Tax Appeals Tribunal, December 28, 1989; ***Matter of Martin***; ***Matter of Autex Corp.***). Thus, since petitioner's LLC membership interest is less than 50%, a review of petitioner's role in the business, and whether he had a duty to act, is critical.

I. Absent the LLC operating agreement, which may have further defined petitioner's role as an LLC member, the scant evidence presented and petitioner's questionable credibility are the only items to consider. Amidst that evidence, petitioner was a bank signatory on bank accounts related to two dealerships, which gave him the authority to make financial payments; petitioner signed at least one payroll check; petitioner hired an employee; and petitioner was in charge of the day-to-day operations of the LLC. Additionally, petitioner's trip to Korea suggests more than an insignificant role in the business, and his membership interest, suggesting management duties and an element of control, was not significantly different from the other three partners, all interests ranging between 22 and 30 percent. Although petitioner claimed he did not participate in the hiring of DHD employees, petitioner's own witness, Mr. Dworkin, testified that petitioner hired him. Petitioner claimed that the other business partners closed bank accounts of which he was a signatory while he was on a business trip in September 2008. The signature cards bear bank notations that indicate the accounts still had some activity until at least late January 2009.

Petitioner maintains that while on the same business trip, the other partners moved the office function of the dealership where petitioner was working to another dealership location. Mr. Dworkin testified that the other partners came into the Kia dealership and after conferring behind closed doors transferred the office functions to another dealership. The only information provided to Mr. Dworkin about their actions was pertinent to his capacity as a sales person, and that he was to process business transactions in a particular manner from that point forward. The testimony of both petitioner and Mr. Dworkin concerning the movement of the dealership office function amounted to nothing more than a relocation of the office to an alternate location, which may have occurred for a multitude of reasons. Nothing in petitioner's or Mr. Dworkin's testimony confirmed that the business records were usurped, or that petitioner's authority to request or review records, make payments, or handle financial decisions were thwarted in any way. Petitioner may have focused his contribution to the business from the posture of his sales acumen, and allowed others to manage the corporate and financial matters and tell him what to sign and when. The case law clearly establishes that "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (***Matter of Ragonesi v. State Tax Commn.***, 88 AD2d 707, 708, 451 NYS2d 301, 303 [1982]). There is no evidence that petitioner was prevented from exercising his authority to make payments, review returns, and be sure the LLC's obligations were being met. Simply, petitioner has failed to demonstrate that he did not have a duty to act on behalf of the company.

J. Petitioner remained in the employment of DHD until the end of December 2008, and began working for a new company on January 19, 2009. Although petitioner changed companies, there is no evidence that he withdrew as a member of the LLC. A member may

withdraw from an LLC only at the time or upon the happening of events specified in the operating agreement (LLCL § 606[a]). Absent evidence of an operating agreement, which may have described an event allowing petitioner's withdrawal, petitioner remained a member until the LLC was dissolved and its affairs wound up. With no evidence of the dissolution of the LLC, petitioner's duty to act on behalf of DHD extended until the latest quarter for which he was assessed, the period ending February 28, 2009. Accordingly, petitioner is not provided relief from the strict liability imposed upon LLC members under Tax Law § 1131(1), nor is such liability pro-rated due to his departure from DHD.

K. Tax Law § 1145(a)(1)(i) imposes a penalty upon persons who fail to timely file a return or timely pay the tax imposed by Articles 28 and 29 of the Tax Law. The penalty and additional interest may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). The taxpayer bears the burden of establishing that the actions were based upon reasonable cause and not willful neglect (***see Matter of Philip Morris***, Tax Appeals Tribunal, April 29, 1993; ***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978, 598 NYS2d 360 [1993]).

Petitioner has offered no evidence upon which a finding of reasonable cause could be based. As the Division points out, cancellation of the penalty contemplates a situation that is beyond the control of petitioner due to no fault of his own. The relocation of office records is insufficient without more. Petitioner continued in the employment of DHD another three months after the relocation of office operations. During that time, petitioner could have taken actions that would have established a lack of willful neglect on his part to act, but this was simply not done. Accordingly, penalties assessed by the Division herein are sustained.

L. The petition of Jamie Franklin is denied, and the notices of determination dated March 11, 2011, are sustained.

DATED: Albany, New York
June 12, 2014

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE