STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **CONSTANTINOS KOKOTAS** for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2007 through August 31, 2010.	:	DETERMINATION DTA NO. 826379

Petitioner, Constantinos Kokotas, 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 March 1, 2007 through August 31, 2010.

A formal hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on September 13, 2016 at 10:30 a.m., with all briefs to be submitted by March 15, 2017, which date commenced the six-month period for issuance of this determination. Petitioners appeared by Ballon, Stoll, Bader & Nadler, PC (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert Maslyn, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation issued notices of determination to petitioner prior to the expiration of the statute of limitations for assessing sales tax for the period in issue.

II. Whether the petition filed with the Division of Tax Appeals was filed within the period of limitations.

III. Whether the Division of Taxation properly determined additional sales and use taxes due from Constantinos 26, Inc.

IV. Whether petitioner was a responsible person of Constantinos 26, Inc.

FINDINGS OF FACT

1. During the period in issue, Constantinos 26 Inc., (Constantinos) operated a deli style restaurant located at 169 West 32nd Street, New York, New York.

2. Constantinos was open from 5:00 a.m. to 6:00 p.m. Monday thru Friday, and from 6:00 a.m. to 5:00 p.m. on Saturdays. Constantinos served a variety of items including breakfast items, hot and cold sandwiches, soups, salads and a variety of nonalcoholic beverages. Constantinos had 4 tables and 14 seats.

3. By letter dated March 12, 2010, the Division of Taxation (Division) advised Constantinos that a sales tax field audit of its books and records for the period March 1, 2007 through February 28, 2010 would commence on April 7, 2010. This audit appointment letter advised Constantinos that all of its books and records pertaining to its sales and use tax liability for the audit period should be available for review on the audit appointment date. The records requested included all sales and use tax books and records and, specifically, sales invoices, cash receipts journal, cash disbursement journal, purchase invoices and the general ledger. On April 15, 2010, the auditor made a survey of the business. Another survey was conducted on November 18, 2010.

4. On April 15, 2010, the auditor received a power of attorney appointing Rajeev Kaul, CPA to represent Constantinos. The power of attorney was executed by petitioner as president of Constantinos. On July 14, 2010, the Division received a subsequent power of attorney

appointing Michael Alamad, CPA to represent Constantinos. This power of attorney was also executed by petitioner as president of Constantinos.

5. During the audit, the only records provided to the auditor were sales tax returns and federal income tax returns for the years 2007, 2008, 2009 and 2010. The federal returns indicate that petitioner was the sole shareholder of Constantinos.

6. During the course of the audit, Constantinos' representative indicated that Constantinos did not keep sales records.

7. By letter dated November 17, 2010, the period under audit was expanded to include March 1, 2010 through August 31, 2010, and an additional request for books and records was made. No additional books and records were provided.

8. The auditor reviewed the records provided, and deemed the books and records provided to be inadequate for the performance of a detailed audit.

9. On July 28, 2010, the auditor attempted to perform an observation test. During the course of the observation, the auditor documented that although the menu stated the restaurant opened at 5:00 a.m., the doors were not opened until 6:00 a.m. There were numerous instances throughout the day that customers were charged less than the menu prices. For instance, the auditor observed a family of five order three sandwiches, two danish, five drinks and one water and were charged $14.35 rather than $34.00, as listed on the menu. In other instances customers were inquiring why they were not charged the full price; some customers were not charged at all. Although a takeout menu also indicated that Constantinos delivered, a telephone call to the restaurant on the day of the observation indicated that the phone was turned off. In addition, the doors were closed at 2:30 p.m. despite the menu indicating the restaurant was open until 6:00

p.m.

10. Based upon the tactics employed by Constantinos during the observation, the auditor requested a second observation. By letter dated October 28, 2010, Constantinos' representative refused to allow a second observation.

11. Based upon the lack of records and the inability to utilize an observation test, the Division's auditor employed an industrial index, the Restaurant Industry Operations Report (RIOR) 2007-2008 Edition, in order to compute gross sales. The RIOR is based upon financial and operating data provided by over 700 members of the National Restaurant Association and members of various state restaurant associations in 2006 as compiled and analyzed by Deloitte and Touche, LLP. This publication contained data on restaurant operations in numerous categories, and it was commonly used in the auditor's office. The Division obtained a rent factor of 10.6% representing rent as a percentage of gross sales. This rent factor was the upper quartile for limited service restaurants, a category consistent with the auditor's observation.

12. Utilizing rent amounts taken from the corporation's federal income tax returns for years 2007, 2008, and 2009, the rental expense was divided by the 10.6% occupancy cost to arrive at gross sales of $4,766,478.02 for the audit period.

13. In discussion with Gregorio Marin, the manager of Constantinos, Mr. Marin estimated the taxable percentage of sales to be 90%. Application of the taxable ratio resulted in audited taxable sales of $4,289,830.20, and additional sales tax of $368,355.45 for the audit period.

14. By Consent Extending the Period of Limitations, the period in which the Division could determine or assess tax against the corporation for the period of March 1, 2007 through February 28, 2010 was extended to March 20, 2011.

15. On December 10, 2010, the auditor met with petitioner and Mr. Marin to discuss the results of the audit. At that meeting, petitioner and Mr. Marin each filled out a responsible person questionnaire (form AU-431). On his questionnaire, petitioner listed his title as president of Constantinos, but indicated that he had no authority on behalf of Constantinos except to sign powers of attorney for the business. On his questionnaire, Mr. Marin indicated that he was responsible for managing Constantinos, that he had authority to sign checks, hire and fire employees, and sign deferred payment agreements. Mr. Marin also indicated that had no decision making authority and no responsibility for remitting tax and held no ownership interest in Constantinos. At the hearing in this matter, petitioner testified that he had no involvement with Constantinos other than renting the business to Mr. Marin for $500.00 a week. In a separate proceeding involving his own proceeding, Mr. Marin testified that petitioner was his boss.[1]

16. On his responsible person questionnaire, petitioner indicated that his address was "525 Brandon Place, Cliffside Park 07010."

17. On February 10, 2011, Notice of Determination, number L-035402805, was issued to Constantinos assessing tax for the period of March 1, 2007 through February 28, 2010, in the amount of $303,872.21, plus interest and penalties. On that same date, Notice of Determination number L-035403193, dated February 10, 2011, was also issued to Constantinos, assessing tax in the amount of $64,483.24 for the period March 1, 2010 through August 31, 2010, plus interest and penalties. Penalties were imposed based upon Constantinos' failure to provide sufficient

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[1] Official notice of the record of proceedings in ***Matter of Marin***, DTA#826378, is taken pursuant to State Administrative Procedure Act § 306(4). Pursuant to State Administrative Procedure Act § 306(4) official notice can be taken of all facts of which judicial notice could be taken. Since a court may take judicial notice of its own records (***Matter of Ordway***, 196 NY 95 [1909]), the Division of Tax Appeals may take official notice of its record of proceedings (***see Bracken v. Axelrod***, 93 AD2d 913 [3rd Dept 1983]).

books and records, and omnibus penalty was assessed based upon the failure to report and pay an amount in excess of 25% of the amount of tax required to be shown on the return.

18. By letter dated February 7, 2011, tax due under Notice L-035402805 was adjusted from $303,872.21 to $261,140.66 based on the Division's failure to take into account the tax previously reported and a change in tax rate in August, 2009.

19. Two notices of determination were issued to petitioner: L-035411967, dated February 11, 2011, determining tax for the period December 1, 2007 through February 28, 2010, in the amount of $239,874.56, plus interest and penalties; and L-035411968, dated February 11, 2011, determining tax for the period March 1, 2010 through August 31, 2010, in the amount of $64,483.24, plus interest and penalties. The two Notices of Determination are addressed to petitioner at "525 Brandon Place, Cliffside Park, NJ, 07010-2901."

20. On June 30, 2014, the Division of Tax Appeals received the subject petition from petitioner challenging the notices of determination. The petition alleges that the notices were not properly issued and therefore invalid and void. On said petition, petitioner's address is listed as "525 Brandon Place, Cliffside Park, New Jersey, 07010."

21. After the petition was filed, the Division of Tax Appeals contacted petitioner's representative herein advising him that the petition was not complete in that it did not include a copy of the statutory notices at issue in this matter. Petitioner's representative was instructed to obtain copies of the statutory notices from the Division but refused.

22. Subsequently, by determination dated October 30, 2014, the petition was dismissed for failing to include statutory notices. By decision dated December 11, 2015, the determination was reversed and the matter remanded to the Supervising Administrative Law Judge to issue a notice

of intent to dismiss petition on the basis of timeliness.

23. In response to a notice of intent to dismiss petition issued on the basis that it appeared that the petition was untimely filed, the Division indicated that it did not have sufficient documentation to submit at that time. Accordingly, the notice of intent to dismiss petition was rescinded and the Division was directed to file an answer to the petition. The Division's answer raised the statute of limitations as an affirmative defense.

24. On April 15, 2016, petitioner (through his representative) made a Freedom of Information Law (FOIL) request to the Division requesting:

> ". . . a copy of the auditor's entire file for the taxpayers for the years 2007 to 2010, inclusive, in accordance with the New York State Freedom of Information Law (FOIL). This request specifically requires copies of the auditor's notes, e-mails, underlying reports, narrative statement (Form DO-220.5) and field audit report (Form DO-1637.2)."

25. In response to the FOIL request, petitioner did not receive copies of the February 11, 2011 notices of determination.

26. At the hearing in this matter, petitioner testified that he had no involvement with Constantinos because he was incapacitated from a car accident and that he rented the business to Mr. Marin. Petitioner also claimed that he never received the notices of determination in issue and only became aware of the notices when he received a tax warrant.

27. In order to prove proper issuance of notices to petitioner, the Division submitted the affidavits of Mary Ellen Nagengast and Bruce Peltier detailing the regular process by which the Division effects the issuance of notices of determination by delivery of the same, properly addressed and with appropriate postage affixed, into the custody of the United State Postal Service (USPS) for mailing via certified mail. Included with the affidavits was a copy of the

certified mail record (CMR) for the block of notices issued by the Division on February 11, 2011, including the notices of determination issued to petitioner on such date. The 23-page CMR listed 249 pieces of mail to be delivered to the USPS.

28. A USPS employee initialed each page of the CMR and affixed a USPS postmark, dated February 11, 2011, to each page of the CMR. The CMR has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." Noticeably absent from this set of affidavits are instructions to the USPS to either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. The CMR does not reflect how many pieces of mail were received at the USPS.

29. Petitioner submitted rebuttal documentation in the form of affidavits from Ms. Nagengast and Mr. Peltier on an unrelated case. In this set of affidavits, Mr. Peltier avers that he reviewed the affidavit of Ms. Nagengast. The Nagengast affidavit in this matter is notarized subsequent to Mr. Peltier's affidavit.

30. Petitioner also submitted printouts dated November 8, 2016 from the USPS website with tracking information that bear the same tracking numbers assigned to the notices of determination at issue herein. One item shows mailing of an article from Albany, New York, on July 14, 2015, and subsequent delivery in Troy, New York, on August 13, 2015. The second printout indicates there were multiple items found for the particular tracking number. No further details are provided.

SUMMARY OF THE PARTIES' POSITIONS

31. Petitioner argues that the Division did not issue the notices of determination within the period of limitations to assess tax because said notices were never sent to his last known address

and therefore they must be cancelled. In addition, petitioner challenges the amount of tax asserted in said notices alleging that the Division's characterization of Constantinos as a limited service restaurant was in error as it is not a restaurant but a deli. Petitioner also challenges the Division's determination that he was a responsible person of Constantinos.

32. The Division asserts that not only did it mail the notices to petitioner's last known address as that term is defined in the statute, it alleges that the Division of Tax Appeals is without jurisdiction to address the merits as the petition was not timely filed. The Division also asserts to the extent the merits may be addressed, it properly used and applied an industry index given Constantinos lack of sales record, and that petitioner was properly determined to be a responsible person of Constantinos.

CONCLUSIONS OF LAW

A. The first issue to be addressed concerns both the timeliness of the notices of determination and the timeliness of petitioner's challenge to the notices. The crux of petitioner's case is that the notices of determination are invalid as he never received them. Petitioner contends that the timeline of events leads to the conclusion that the notices did not exist until two weeks prior to the hearing. Petitioner also contends to the extent that the notices were mailed by the Division on February 11, 2011, the mailing was defective because the address listed thereon did not contain his apartment number. Conversely, the Division contends that the petition challenging the notices of determination is untimely.

B. Petitioner's assertion that the Division's failure to provide him with copies of the statutory notices under FOIL is proof the notices were manufactured for purposes of the hearing is rejected. In rejecting this argument, it is noted that the FOIL request made by petitioner did

not specifically request notices of determination. Furthermore, as pointed out by the Division, the Division of Tax Appeals lacks jurisdiction to provide a remedy where there are claims of the Division's noncompliance with FOIL (***see Matter of 4U Convenience, Inc.***, Tax Appeals Tribunal, February 12, 2016). Petitioner's allegations are mere innuendo and speculation that do not give rise to invalidating the notices. The fact that the Division did not submit papers in response to the notice of intent to dismiss petition after the matter had been remanded is of no consequence. Likewise, petitioner's claims of prejudice because the first time he saw the notices at hearing is simply unavailing. Petitioner's representative refused to request copies of said notices from the Division when prompted to do so. His claims of prejudice are unavailing. Finally, petitioner has laid no foundation for the use of the tracking information provided on the USPS website. There has been no showing as to whether the article numbers used by the Division in mailing the notices to petitioner were recycled or used again by the USPS.

C. Tax Law § 1138(a)(1) provides a 90-day statutory time limit for filing a petition following the issuance of a notice of determination. Alternatively, a taxpayer may file a request for conciliation conference with BCMS to protest a notice of determination if such request is filed within the same 90-day statutory time limit (Tax Law § 170 [3-a] [a]). Pursuant to these provisions, a notice of determination is binding upon a taxpayer unless a timely petition or request for conciliation conference is filed. The Division of Tax Appeals lacks jurisdiction to consider the merits of a late-filed protest (***see Matter of Lukacs***, Tax Appeals Tribunal, November 8, 2007; Tax Law § 2006 [4]). In this case the Division is requesting dismissal of the petition alleging that it was filed more than 90 days following issuance of the notices of determination.

D. Where the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (***see Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (***see Matter of New York City Billionaires Constr. Corp.***, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR ***(see e.g. Matter of Western Aries Construction, LLC*** Tax Appeals Tribunal, March 3, 2011; ***Matter of DeWeese***, Tax Appeals Tribunal, June 20, 2002).

E. Tax Law § 1138(a)(1) provides that "[a] notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address. . ." Tax Law 1147(a) defines last known address as "the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable."

Here, the notices were properly addressed to petitioner's last known address, which is the address appearing on the responsible person questionnaire petitioner filled out two months prior to the date of the notices. On said questionnaire, petitioner did not include an apartment number nor was an apartment number included on the petition in this matter. Although petitioner claims

to have filed New York State personal income tax returns prior to February 11, 2011 that included his apartment number, the best evidence would have been copies of those returns that were not introduced into evidence.

F. The Division has also established the existence of a standard mailing procedure through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the period at issue.[2] Nonetheless, although the CMR has a USPS postmark on every page and has initials next to each postmark, the CMR has not been properly completed as there is no indication or acknowledgment of the number of pieces of mail actually received at the post office, as called for by the stamped instruction at the base of the page. Accordingly, it cannot be said that the Division proffered a properly completed mail log so as to trigger the period within which petitioner had to file a petition. In such case the proper remedy is to toll the period of limitations within which to file a petition and deem the petition to have been timely filed (***Matter of Brager***, Tax Appeals Tribunal, May 23, 1996; ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

G. Turning to the merits, Tax Law § 1105(a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A "retail sale" is "a sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101[b][4][I]). Tax Law § 1135(a)(1) provides

[2] Petitioner's assertions challenging the veracity of the Division's affidavits are rejected. The Division's affiants are attesting to the Division's process of generating and mailing statutory notices. The fact that an affidavit made by one of the affiants in a unrelated case attested that he had read the affidavit of the other affiant which was notarized subsequent to his affidavit does not act to disqualify his affidavits in all subsequent cases.

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."

H. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed was 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 a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (***see Matter of Your Own Choice, Inc.,*** Tax Appeals Tribunal, February 20, 2003).

I. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of Your Own Choice, Inc.***, as follows:

> "To determine the adequacy of a taxpayer's records, the Division must first request ***(Matter of Christ Cella, Inc. v. State Tax Commn.***, [102 AD2d 352, 477 NYS2d 858] ***supra***) and thoroughly examine (***Matter of King Crab Rest. v. Chu***, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255; ***Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138; ***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***see also***, ***Matter of Hennekens v. State Tax Commn.***, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is 'virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit' (***Matter of Chartair, Inc. v. State Tax Commn.***, 65

> AD2d 44, 411 NYS2d 41, 43; ***Matter of Christ Cella, Inc. v. State Tax Commn.***, ***supra***), 'from which the exact amount of tax due can be determined' (***Matter of Mohawk Airlines v. Tully***, 75 AD2d 249, 429 NYS2d 759, 760).
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> Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (***Matter of Urban Liqs. v. State Tax Commn.***, ***supra***). The estimate methodology utilized must be reasonably calculated to reflect taxes due (***Matter of W.T. Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451; ***Matter of Cousins Serv. Station***, Tax Appeals Tribunal, August 11, 1988). In addition, '[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case' (***Matter of Grecian Sq. v. New York State Tax Commn.***, 119 AD2d 948, 501 NYS2d 219, 221)."

J. In this case, the record clearly establishes that the Division made proper requests for books and records and that the business did not have adequate sales records. It is also clear that the Division was well within its right to utilize an external index to estimate sales tax due. As the Division's attempt at performing an observation test to estimate sales was thwarted by Constantinos as detailed in the Findings of Fact, the Division consulted the National Restaurant Association's RIOR for 2007/2008. Pursuant to this report, the auditor obtained the upper quartile occupancy costs of 10.6% for limited service restaurants. Taking petitioner's rental expense from the federal tax returns obtained during the audit, the Division divided the 10.6% occupancy cost to arrive at gross sales for the audit period. The Tax Appeals Tribunal has

approved the use of a rent factor on the sufficiency of the Division's identification of the statistical report on which its calculations were based (***see Matter of Abbasi***, Tax Appeals Tribunal, June 12, 2008). The Tribunal's rationale was that the report was available to the public and a taxpayer could produce evidence to challenge its soundness or applicability.

Here, petitioner makes unsupported assertions that use of a RIOR for later years would have produced differing results alleging that sales in the restaurant industry declines subsequent to 2006, the year the data for the report was collected. In addition, petitioner claims that Constantinos was not a restaurant, but a deli, so use of the RIOR was in error. Petitioner's arguments are rejected. While a different index may have yielded different results, it has not been proven that the classification chosen by the auditor was clearly erroneous. Having produced little in the way of records during audit, petitioner cannot now be heard to complain about any resulting inexactness of the audit (***see Matter of Meyer v State Tax Commn.***, 61 AD2d 223, 228 [3d Dept 1978], ***lv denied*** 44 NY2d 645 [1978]). As pointed out by the Division, the use of the rent factor taken from the Restaurant Industry Operations Report for a time period not within the audit period to estimate the amount of taxable sales is reasonable (***see Matter of Humphrey House***, Tax Appeals Tribunal, July 31, 1997). In addition, the record makes it clear that Constantinos is indeed a restaurant.[3]

K. Having addressed the sufficiency of the audit, it must be determined whether petitioner has met his burden of proving that he was not a responsible person of Constantinos during the period in issue. Tax Law § 1133(a) states that "every person required to collect any tax imposed

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[3] Merriam Webster's Collegiate Dictionary 10th Edition defines restaurant as "a business establishment where meals or refreshments may be obtained."

by this article shall be personally liable for the tax imposed, collected or required to be collected under this article . . ."

L. Tax Law § 1131(1) defines a "person required to collect any tax imposed by this article [Article 28]" to include:

> "any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article; and any member of a partnership."

M. Whether a person is a responsible officer must be determined based upon the particular facts of each case (***see Matter of Coppolla v. Tax Appeals Tribunal***, 37 AD3d 901 [3rd Dept 2007]; ***Matter of Hall***, Tax Appeals Tribunal, March 22, 1990, ***confirmed*** 176 AD2d 1006 [3rd Dept 1991]. Factors stated by the Division's regulations include: whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

The Tax Appeals Tribunal, in ***Matter of Constantinos*** (Tax Appeals Tribunal, September 27, 1990), stated:

> "[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 564, 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 862, 865; ***Chevlowe v. Koerner***, ***supra***, 407 NYS2d 427, 429; ***Matter of William D. Barton***, [Tax Appeals Tribunal, July 20, 1989]; ***Matter of William F. Martin***, ***supra***; ***Matter of Autex Corp***., ***supra***)."

N. In this case, it is determined that petitioner was a responsible person of Constantinos as he was the sole owner and president of Constantinos. He signed powers of attorney appointing professionals to represent Constantinos during the audit and the manager of Constantinos testified that petitioner was his boss. Although petitioner testified he was incapacitated from an automobile accident, he submitted no documentation to corroborate this claim and, having observed petitioner's testimony, I did not find him to be a credible witness. Quite simply, petitioner has not carried his burden of establishing that he was not a responsible person of Constantinos.

O. Accordingly, the petition of Constantinos Kokotas is denied and the February 11, 2011 notices of determination are sustained.

DATED: Albany, New York
September 7, 2017

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE