STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MAURICE BITTON	:	DETERMINATION DTA NO. 827185
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2002 through May 31, 2002.	:	

Petitioner, Maurice Bitton filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2002 through May 31, 2002.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on February 2, 2017 at 10:30 A.M., in New York, New York, with all briefs to be submitted by August 8, 2017, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Linda Farrington, Esq., of counsel).

ISSUE

Whether petitioner was properly determined to be a person under a duty to collect and remit sales and use taxes on behalf of MBMB, Inc., pursuant to Tax Law §§ 1131 (1) and 1133 (a).

FINDINGS OF FACT

1. MBMB, Inc. (MBMB) timely filed a New York State and Local Quarterly Sales and Use Tax Return (Form ST-100), for the tax period March 1, 2002 through May 31, 2002. This return reported gross sales of $595,118.00, and sales tax due in the amount of $49,097.24. This

amount was reduced by a claimed vendor collection credit of $150.00, to arrive at a total amount due in the amount of $48,947.24. MBMB did not remit payment with this return.

2. On December 26, 2003, the Division of Taxation (Division) issued a Notice of Determination (Notice No. L-023333004) to petitioner, Maurice Bitton, for sales and use taxes due for the period March 1, 2002 through May 31, 2002 in the amount of $49,097.24, interest due in the amount of $10,543.41 and penalty due of $13,629.09, less assessment payments/ credits of $1,905.90, for a current balance due of $71,363.84. The notice indicated that petitioner was being held liable as an officer or responsible person of MBMB.

3. The Division issued a notice of proposed driver license suspension, dated September 11, 2014, to petitioner pursuant to Tax Law § 171-v (suspension notice). Attached to the suspension notice was a consolidated statement of tax liabilities referencing two outstanding assessments, notice numbers L-035536738[1] and L-023333004. Subsequently, petitioner protested the suspension notice by requesting a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS). After a conciliation conference, BCMS issued a conciliation order, dated June 12, 2015, that denied the request and sustained the suspension notice.

4. On August 26, 2015, petitioner filed a petition challenging the suspension notice and the underlying assessment, notice number L-023333004.[2] On November 4, 2015, the Division filed its answer. Subsequently, by letter, dated June 24, 2016, addressed to the undersigned administrative law judge, the Division's representative advised that the Division had cancelled

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[1] Assessment ID # L-035536738 was issued to Maurice Bitton as the responsible person of LeCave, LLC, and assessed sales tax due for the tax period ended November 30, 2009.

[2] Petitioner also filed a petition challenging the suspension notice and the underlying assessment, notice number L-035536738. The Division of Tax Appeals assigned DTA No. 827184 to that petition.

the suspension notice, and was prepared to proceed on the merits of the underlying assessment, notice number L-023333004.[3] The Division, pursuant to permission granted on August 10, 2016, filed an amended answer addressing notice of determination L-023333004, and clarifying the issues.

5. The record in this matter is rather sparse. At the hearing, petitioner presented only himself as a witness, and four exhibits.

6. In 1999, petitioner entered into a ten-year lease for premises located at 64 East First Street, New York, New York. The record does not include a copy of the lease. However, petitioner testified that the rental terms were very favorable and included a five year renewal clause.

7. At approximately the same time in 1999, petitioner formed MBMB for purposes of operating a restaurant named Chabada in the East First Street location. Petitioner did not provide any documentation regarding the formation of MBMB. The record does not include the corporation's articles of incorporation, or its by-laws.

8. Initially, petitioner testified that he thought he was the only shareholder when MBMB was incorporated. However, petitioner later said that he was actually a 50% owner with another person, but could not recall his name. Petitioner indicated that he supplied the money to the corporation, and the other individual provided knowledge and experience in the restaurant industry to the corporation.

9. On an unknown date, petitioner hired Roy A. Herbert & Company to be MBMB's accountant. He also hired numerous employees of the restaurant including Michele Kaufman.

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[3] This letter also advised that the Division was prepared to proceed on the underlying assessment protested in petitioner's petition assigned DTA No. 827184.

10. On an unknown date, Chabada opened as a small restaurant that contained 50 to 60 seats and a bar area. Initially, the restaurant served beer and wine.

11. According to petitioner, it did not work out with the unnamed partner in Chabada, and that individual left the corporation at an undisclosed time. Petitioner vaguely testified that the individual signed papers relinquishing his interest in MBMB and the restaurant, and may have been paid $20,000.00 by an unnamed investor, who wanted "to make it look nice." Petitioner testified that he again owned 100% of MBMB at that time.

12. On September 8, 2000, petitioner signed the signature card for MBMB's commercial checking account with Fleet Bank and listed himself, with the title of "president," as the sole authorized signatory for the account.

13. On September 25, 2000, MBMB filed an application for an on-premises liquor license with the New York State Liquor Authority (SLA), which application listed petitioner as MBMB's sole principal, and its trade name and address as Chabada, East First Street, New York, New York. According to a printout from the SLA website, this liquor license was active until December 31, 2004.

14. The record is silent as to the date on which Chabada closed.

15. According to petitioner, sometime in 2000, Brian McNally, a restauranteur who had been involved in the creation of several successful New York City restaurants in the 1980's and 1990's, approached him with a proposition regarding Chabada. Petitioner testified that Mr. McNally proposed a partnership in which he would spend up to $300,000.00 to renovate the restaurant's interior in three months, then open and manage the new restaurant in the East First Street location, and petitioner would "make a lot of money." He further testified that he and Mr. McNally agreed to a "50/50" partnership and, on an unknown date, Mr. McNally received a 50%

interest in MBMB. The record does not include any memorialization of that agreement. Nor does the record include MBMB's corporate minute book, corporate by-laws, or any board of director minutes. The record is silent as to what corporate office, if any, Mr. McNally held.

16. Petitioner regularly went to the restaurant to see how the renovations were progressing. Because Mr. McNally kept making interior design changes, renovation of the restaurant dragged on for many months. Although Mr. McNally paid the rent and the salaries of three MBMB employees, including Ms. Kaufman, who assisted him with the renovations, petitioner was not receiving any money and became frustrated as renovations continued for about a year. As a result, petitioner and Mr. McNally had a falling out regarding the prolonged delay in the opening of the restaurant. Petitioner claimed that Mr. McNally agreed to buy him out at that time.

17. Petitioner submitted a one-page document entitled "Agreement To Sell Shares in Business MBMB, Inc., dated December 10, 2001, executed by him and Mr. McNally, which provided, in relevant part, as follows:

> "Whereas the Seller desires to sell his shares 50% and the Buyer desires to buy the shares of business of MBMB INC now being operated at 64 east 1st street NY and known as restaurant and all assets AS IS thereof as contained in Schedule 'A' attached hereto, the parties hereto agree and covenant as follows:
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> 1. The total purchase price for shares is. $30,001.00 Dollars payable as follows: (a) $1 paid in cash as a deposit upon execution of this Agreement, (b) $ 30,000.00 additional to be paid in checks paid by a note of the Buyer to the Seller, bearing interest at the rate 9% percent per annum with an option of the Buyer to prepay the entire outstanding obligation without penalty.
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> 2. The Buyer shall pay 6 note payments as follows. $5,000. Each, Starting on February 1 2002 or at the opening of the restaurant.
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> 3. The Buyer is responsible to pay all bills and clear the Seller of any dedt [sic].

> 4. If the Buyer at anytime fails to fulfill his obligations herein, all deposits made hereunder by the Buyer shall be retained by the Seller.
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> 5. The Buyer agrees that this Agreement is contingent upon the following conditions: (a) Seller keeps the Lease on the premises until Buyer paid all note payable to seller. (b) Buyer changes all necessary licenses to the Buyer. (c) Take premises AS IS condition."

Schedule A was not attached to the copy of the agreement submitted into the record at the hearing. Petitioner testified that the "licenses" the agreement referred to were the liquor license and the sales tax certificate of authority.

18. After the agreement was executed in December 2001, renovations continued and the three MBMB employees continued to be paid. Although he continued to confirm that Mr. McNally paid the location's rent, petitioner claimed that he did not go to the restaurant because he was no longer a partner. He claimed that Mr. McNally named the restaurant Smith and designed the interior to have 95 seats in the main dining room and 50 seats at the bar. Petitioner also claimed that Mr. McNally hired all of Smith's additional employees.

19. Petitioner submitted copies of four restaurant reviews regarding Smith, and Mr. McNally's involvement in the same.[4] Based upon a review of these articles, Smith opened on January 24, 2002, and was packed most evenings with Mr. McNally's friends and acquaintances, and many celebrities. In all four reviews, Smith was called Mr. McNally's new restaurant, an understated restaurant in the East Village.

20. According to petitioner, he dined on occasion at Smith and noticed that it was busy. Despite the fact that it was busy, Mr. McNally did not pay petitioner in February 2002. Petitioner

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[4] These reviews included The New York Times article by Julia Chaplin published February 3, 2002, a web review by Felix Saimon posted on February 4, 2002, a New York Post article by Steve Cuozzo, dated February 6, 2002, and a restaurant review by Adam Platt that appeared in the March 25, 2002 issue of New York Magazine. Petitioner downloaded all four reviews from the Internet.

testified that Mr. McNally said that he would begin to pay later. Petitioner continued to confirm that Mr. McNally was paying the rent.

21. Within two or three months of its opening, Smith closed on an unknown date. At some point thereafter, petitioner learned that Smith had closed, and called Mr. McNally to ask what was going on. Mr. McNally told petitioner not to worry, he was going to renovate again, create something new, and continue. During that telephone call, petitioner also asked where his money was, and Mr. McNally told him "wait, wait, don't worry." It appears that all of the restaurant's employees were paid through the last date that the restaurant was open.

22. According to petitioner, nothing happened at the restaurant for a month. After contacting the landlord and learning that the current month's rent had not been paid, petitioner testified that he went to Mr. McNally and told him that he was "taking the place." Petitioner further testified that Mr. McNally, without saying anything, "just got up and left." He could not recall whether that happened in May 2002 or June 2002. Petitioner also testified that "he took back the space and started to sell stuff." According to petitioner, at the time he took back the business, there were "some bills outstanding but not much."

23. Petitioner operated Smith for a number of months, serving meals in the bar area only and screening off the main dining room. Petitioner rehired Ms. Kaufman and Smith's bartender/ manager, and hired a new chef. At some point, petitioner was advised by Mr. McNally's attorney that he could not use the name Smith because Mr. McNally had a reputation and it was his name. Petitioner changed the name to Star Food and MBMB continued to operate the restaurant as Star Food for about a year. The restaurant's name was changed to Star 64 at some point thereafter.

24. As noted in Finding of Fact 1, on June 20, 2002, MBMB filed a sales tax return for the period March 1, 2002 through May 31, 2002, but did not remit the tax reported due thereon. An

illegible signature of the taxpayer appears on this return that was prepared by Roy A. Herbert & Company. At the hearing, petitioner stated that he did not recognize the signature on the return, but thought it might be that of Mr. McNally.

25. MBMB timely filed a sales tax return for the period June 1, 2002 through August 31, 2002, on which it reported gross sales of $3,113.00 and total amount of sales tax due of $252.46 This return was prepared by Roy A. Herbert & Company. Petitioner signed the check sent in payment of sales tax due for that period. The check, dated September 18, 2002, payable to "NYS Sales Tax" in the amount of $252.46, was drawn on MBMB's HSBC checking account. At the hearing, petitioner admitted that he signed this check. Petitioner also acknowledged that he opened MBMB's HSBC checking account in 1999 and it remained active through an unidentified date beyond September 2002.

26. As noted in Finding of Fact 2, a notice of determination was issued to petitioner as a responsible person of MBMB for the period March 1, 2002 through May 31, 2002. The Division determined petitioner to be a responsible person on behalf of MBMB based upon the following:

a) Petitioner signed the signature card for MBMB's business checking account with Fleet Bank and identified himself as the corporation's president;

b) Petitioner was listed as a principal for the liquor license of MBMB with the State Liquor Authority (SLA) during the assessment period;

c) Petitioner was referenced as an owner of Smith in articles found in the July 17, 2002 New York Times Food section, and the September 23, 2002 issue of New York Magazine; and

d) Petitioner signed checks on behalf of the business, including the check remitted with the sales tax return for the quarter following the assessment period.

27. On an unknown date, the Division also issued a notice of determination to Ms. Kaufman as a responsible person of MBMB for the period March 1, 2002 through May 31, 2002. The disposition of that assessment is not part of the record.

28. At the hearing, petitioner admitted that he kept the lease in his name at all times and that Mr. McNally never paid the agreed monies. Petitioner also admitted that he never notified the SLA or the Division that he was no longer in the business, and never checked to see if Mr. McNally had made such notifications. In addition, when asked if the sale had been finalized petitioner admitted that he did not know. Petitioner never hired an attorney to assist in the collection of the $30,000.00 from Mr. McNally. Petitioner guessed that he reacquired 100% of MBMB in June 2002. He did not pay Mr. McNally for his 50% interest in the corporation.

29. The record includes a printout of an article titled "OFF THE MENU," by Florence Fabricant, published in the July 17, 2002 New York Times food section, that states in relevant part, as follows.

> "The survival rate for restaurants is notoriously low. Then there's the case of Smith, 64 East First Street, a bistro that Brian McNally, the managing partner, announced he had closed a month ago for renovations. But Mr. McNally did not account for the determination of Maurice Bitton, Smith's co-owner, who has kept the restaurant open.
>
> Mr. Bitton has hired Shawn Knight as chef, and is serving a small dinner menu in the bar area; the dining room, behind screens, remains empty. 'I'll stay open until McNally buys me out,' Mr. Bitton said. Mr. McNally said he was meeting with his lawyers."

30. The record also includes a printout of the "Intelligencer" article by Marc S. Malkin, published September 23, 2002 in New York Magazine, in which the paragraph titled "Brian McNally's Disappearing Act" states, as follows.

> "Smith will survive. So says co-owner Maurice Bitton. The Lower East Side American bistro, which Bitton opened with Brian McNally to much hype last

> winter, came close to filing for bankruptcy recently, but Bitton claims he's attracted enough investors to pay off outstanding debts. There's still the McNally drama, however. He hasn't set foot in the place for four months, and Bitton says he's been trying to contact him about ending their partnership. When we reached McNally, he declined to talk about the bankruptcy proceedings or his financial stake in the restaurant. 'I have nothing to do with it,' he told us last week. 'I have no control of what is happening at the restaurant at the moment.' Bitton begs to differ, saying McNally is still a partner, albeit an unwanted one."

At the hearing, petitioner was asked whether Smith had filed for bankruptcy, petitioner replied that he did not know what Mr. McNally may have done, "except that he left and never come [sic] back."

31. At the time he incorporated MBMB in 1999, petitioner was working for an unidentified embroidery company in Hoboken, New Jersey. Petitioner continued to be employed by that embroidery company until sometime after 2002.

32. For a number of years after the period in issue, MBMB continued to operate a restaurant at the East First Street location. During that period of time, petitioner never took another partner in MBMB. Petitioner never dissolved MBMB or disposed of his shares. The lease for the East First Street premises remained solely in petitioner's name until about 2006, at which time Patrice Biahina's name was added.

33. Since birth, petitioner has had Familial Mediterranean Fever, a chronic medical condition where he endures severe abdominal pain and high fevers. In a letter, dated October 21, 2014, petitioner's gastroenterologist, William H. Perlow, M.D., stated that petitioner "requires [medication] to control his Mediterranean Fever. Each episode could last several days depending upon the pain and fever during which time he cannot go to work."

34. In his petition, petitioner asserted, among other things, that: MBMB was sold to Mr. McNally on December 10, 2001; at the time of the assessment, he was not the legal owner of the

company; he had no involvement at all with the company; and at the conciliation hearing, the Division's representative stated that he was not legally responsible for the taxes.

35. The hearing in this matter was held on February 2, 2017 in New York, New York. Prior to the conclusion of the hearing, the administrative law judge asked each party whether they had additional evidence they wished to submit, and advised the parties that the record would otherwise be closed. Petitioner replied that he had nothing further he wished to submit. The Division's representative also replied that she had nothing further she wished to submit. The record closed at the conclusion of the hearing, and a briefing schedule was set.

36. Included with petitioner's letter/reply brief were eight documents, consisting of copies of petitioner's exhibit 1, and the following documents:

a) A copy of a three-page closing statement for the sale of 50% stock interest in MBMB, Inc., on November 3, 2000;

b) A copy of a check drawn on Lefrak & Assoc., P.C. Master Escrow checking account, dated November 3, 2000, payable to MBMB, Inc., in the amount of $24,509.13;

c) A copy of MBMB, Inc. stock certificate number 1, issued to Maurice Bitton on November 3, 2000;

d) A copy of a document entitled "Unanimous Consent of the Directors of MBMB, Inc., dated November 2, 2000, electing two persons to the corporation's board of directors;

e) A copy of a document entitled "Unanimous Written Consent of the Directors of MBMB, Inc., dated November 2, 2000, electing persons as officers of the corporation;

f) A copy of a document entitled "Unanimous Written Consent of the Shareholders of MBMB, Inc., dated November 7, 2000, electing the corporation's board of directors; and

g) A copy of Exhibit "A" Certificate of Value, dated November 3, 2000.

CONCLUSIONS OF LAW

A. 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."

B. Tax Law § 1131 (1) defines "person required to collect any tax imposed by this article" to include:

> 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.

C. The mere holding of corporate office does not, per se, impose tax liability upon an office holder (***Matter of Chevlowe v Koerner***, 95 Misc 2d 388 [1978]). 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 [3d Dept 1987]; ***Matter of Hall***, Tax Appeals Tribunal, March 22, 1990, ***confirmed*** 176 AD2d 1006 [3d Dept 1991]; ***Matter of Martin,*** Tax Appeals Tribunal, July 20, 1989*,* ***confirmed*** 162 AD2d 890 [3d Dept 1990]). 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" (citations omitted).

D. 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; ***see also Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998). One in a position of responsibility cannot escape the same by disregarding or delegating such responsibility to others to discharge (***Matter of Ragonesi v State Tax Commn.***, 88 AD2d 707 [3d Dept 1982]; ***Matter of Blodnick v State Tax Commn.*** 124 AD2d 437 [3d Dept 1986]; ***Matter of Shah,*** Tax Appeals Tribunal, February 25, 1999).

E. Petitioner bears the burden of proof to overcome the presumed correctness of the Division's assessment (***Matter of Mera v Tax Appeals Trib.***, 611 NY2d 716 [1994]; ***Matter of Blodnick v State Tax Commn.***). 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 he was thwarted by others in carrying out his corporate duties through no fault of his own (citations omitted)" (***Matter of Goodfriend***). Petitioner has failed to sustain his burden of proof.

F. Petitioner contends that he was not a responsible person during the period March 1, 2002 through May 31, 2002 because he sold his interest in MBMB to Mr. McNally on December 10, 2001. As proof of the sale of his interest in the corporation, petitioner submitted the agreement signed by him and Mr. McNally on December 10, 2001. Review of the terms of that agreement indicates that Mr. McNally was required to pay a total of $30,000.00 in six note payments, beginning on February 1, 2002, or at the opening of the restaurant, and to satisfy certain contingencies including, among others things, changing all necessary licenses to his

name. It is clear from the record that the terms of the agreement were never fulfilled and the sale of petitioner's interest in MBMB was never finalized. At the hearing, petitioner admitted that Mr. McNally never paid the agreed monies, and he never hired an attorney to assist in the collection of the $30,000.00 from Mr. McNally. Petitioner also admitted that he never notified the SLA or the Division that he was no longer in the business, and never checked to see if Mr. McNally made such notifications. It is noted that the SLA website listed petitioner as the sole principal on MBMB's liquor license from September 25, 2000 through December 31, 2004 (***see*** Finding of Fact 13). In addition, the lease on the premises remained in petitioner's name during the entire period. Petitioner also remained an authorized signatory on MBMB's HSBC checking account beyond September 2002 (***see*** Finding of Fact 25). When asked at the hearing if the sale was finalized, petitioner responded that he did not know (***see*** Finding of Fact 28). As further evidence that the sale never took place, petitioner also testified that in either May 2002 or June 2002, he "took back the space and started to sell stuff" (***see*** Finding of Fact 22). Petitioner clearly remained a 50% owner of MBMB during the period March 1, 2002 through May 31, 2002.

Petitioner argues that he had no involvement in the business after the alleged sale, and Mr. McNally was managing the corporation during the period at issue. Petitioner's argument is without merit. Although petitioner referred to Mr. McNally as his partner, MBMB, the corporation, did business as Smith, during the period at issue, and for a period of time thereafter. The limited documentation in the record indicates that petitioner was MBMB's president (***see*** Finding of Fact 12). There is no evidence that petitioner relinquished his corporate office at the time the agreement to sell his shares was executed in December 2001. Petitioner was a corporate officer and one of two shareholders in the corporation and, as such, had a fiduciary duty to the

corporation in complying with the corporation's tax obligations (***see Matter of Martin v Commissioner of Taxation & Fin.***, at 891; ***Matter of Goodfriend***). The controlling consideration is the authority to act and not the degree to which one actually exercises that authority (***Matter of Coppola v Tax Appeals Trib. of the State of NY***, 37 AD3d 901 [3d Dept 2007]; ***accord Matter of Ippolito v Tax Appeals Trib. of the State of NY***, 116 AD3d 1176 [3d Dept 2014]). Smith finally opened on January 24, 2002. Petitioner dined at the restaurant on occasion, saw how busy it was, and spoke with Mr. McNally regarding payment of the money due on their agreement. Mr. McNally said that he would begin to pay later. As he had throughout his "partnership" with Mr. McNally, he confirmed that the monthly rent for the location was paid. Within two or three months of opening, Smith closed on an unknown date. Petitioner contacted Mr. McNally regarding the closure and his money, and was advised by Mr. McNally that, after some renovations, the restaurant would reopen, and he would be paid. When he discovered that the rent had not been paid, petitioner immediately went to the premises where he confronted Mr. McNally and took back the business. It is unclear whether that took place in May 2002 or June 2002. Then, petitioner began to sell some business "stuff." Thereafter, petitioner operated Smith, filed a sales tax return, and signed and remitted a check in payment of sales tax for the following quarter. It is clear that petitioner simply chose to trust Mr. McNally and delegate responsibility for management of the corporation's financial matters to him for at least a part of the period at issue. Such a delegation does not excuse petitioner from responsibility (***Matter of LaPenna***, Tax Appeals Tribunal, March 14, 1991).

G. With respect to petitioner's assertion that Mr. McNally was the sole management partner, and he was a silent partner due to his pre-existing medical condition, Familial Mediterranean Fever, that precluded him from being a "hands on" partner, it is unavailing. The

record contains no evidence that petitioner's condition was worsened during the period at issue. Despite his chronic medical condition, petitioner operated the restaurant both before and after the period March 1, 2002 through May 31, 2002, including, at times, as the sole owner. As such, the record indicates that petitioner's chronic medical condition did not interfere with his ability to perform his duty to act on behalf of the corporation.

H. Petitioner contends that Mr. McNally was the responsible person for the sales tax due for the period at issue. It is not a defense, however, to petitioner's position that another party may also be liable for taxes due from the corporation.

Tax Law § 1133 (a) provides that "*every* person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article" (emphasis added), thereby creating joint and several liability for unpaid sales tax (***Matter of Phillips***, Tax Appeals Tribunal, May 11, 1995). The Division is under no obligation to pursue other responsible persons before proceeding against petitioner (***Matter of Risoli v Commissioner of Taxation and Finance***, 237 AD2d 675 [3d Dept 1997]).

Accordingly, petitioner is a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133 and is personally liable for the sales taxes due on behalf of MBMB for the period March 1, 2002 through May 31, 2002.

I. Petitioner asserts that the tax representative at BCMS said petitioner was not legally responsible for MBMB's outstanding sales tax liability and, therefore, the subject notice of determination should be cancelled. Petitioner's assertion is rejected. The Bureau of Conciliation and Mediation Services is established within the Division of Taxation and is responsible "for providing conciliation conferences" (Tax Law § 170 [3-a] [a]). Such conferences are provided at the sole option of the taxpayer, are not quasi-judicial in nature and are not governed by

"procedures substantially similar to those used in a court of law" (***Ryan v New York Telephone Co.***, 62 NY2d 494 [1984]). The conciliation conference is not an "adjudicatory proceeding" as defined in article 3 of the State Administrative Procedure Act (SAPA). Specifically, the conciliation conference process does not comply with record requirements for adjudicatory proceedings under SAPA § 302 (conciliation conferences are neither electronically nor stenographically recorded) and conciliation orders do not comply with requirements for decisions, determinations, and orders under SAPA § 307 (conciliation orders contain neither findings of fact nor conclusions of law). The conciliation conference process is, in essence, a settlement forum (***see*** 20 NYCRR 4000.5 [c] [1] [i]), and discussions and proposed adjustments made at conciliation conferences are in the nature of settlement negotiations and may not be considered as precedent or be given any force or effect in any subsequent administrative proceeding (Tax Law § 170 [3-a] [f]; ***see Matter of Petak v Tax Appeals Trib.,*** 217 AD2d 807 [3d Dept 1995]; ***Matter of Sandrich, Inc.***, Tax Appeals Tribunal, April 15, 1993). As the Division correctly points out, petitioner never attended a conciliation conference on the MBMB liability; rather, the subject of his conciliation conference was the Notice of Proposed Driver's License Suspension issued to him, which such statutory notice was sustained by a conciliation order. Any discussions of the MBMB liability that may have occurred at the BCMS conciliation conference were in the nature of settlement negotiations and may not be given any force or effect in any subsequent administrative proceeding (***id.***).

J. 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 may be abated if the delay or failure was due to reasonable cause and not due to willful neglect (Tax Law § 1145 [a] [1] [iii]). In determining whether reasonable cause and good faith exist, the

regulations provide several specific grounds and a catch-all, which provides for a finding of reasonable cause based upon any "ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay," demonstrating an "absence of willful neglect" (20 NYCRR 2392.1 [d] [5]). 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 [3d Dept 1993]).

Petitioner has offered no evidence that would support abatement of the penalties imposed, and the same are, therefore, sustained.

K. It is noted that seven additional documents included with petitioner's letter and reply brief have been disregarded. The submission of documents after the closing of the record denies the opposing party the opportunity to question the evidence in the record (***Matter of Saddlemire***, Tax Appeals Tribunal, July 14, 2000).

L. The petition of Maurice Bitton is denied, and the Notice of Determination, dated December 26, 2003, is hereby sustained.

DATED: Albany, New York
February 8, 2018

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE