

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	
<b>THIRTY 3 SIXTY 3 LLC AND JACQUELINE ACEVEDO VILLANUEVA</b>	:	<b>ORDER</b>
	:	DTA NOS. 829423 AND
	:	829424
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, 2014 through February 28, 2017 and for the Period	:	
June 1, 2015 through February 28, 2017.	:	

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Petitioners, Thirty 3 Sixty 3 LLC, and Jacqueline Acevedo Villanueva, filed petitions for revision of determinations or for refunds of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2014 through February 28, 2017 and for the period June 1, 2015 through February 28, 2017. These two matters have been consolidated.

On June 30, 2021, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel), brought a motion seeking summary determination in the above-referenced matters pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On November 23, 2021, petitioners, appearing by Thomas DiLullo, P.C. (Thomas F. DiLullo, Esq., of counsel), submitted papers in opposition and cross-moved for summary determination. All responding papers were due on April 21, 2022, which date commenced the 90-day period for issuance of this order. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

***ISSUE***

Whether issues of fact mandating a hearing are present such that the Division of Taxation's and petitioners' motions for summary determination should be denied and the matters set down for a hearing.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) conducted a sales and use tax audit of petitioner, Thirty 3 Sixty 3 LLC (the LLC), for the period June 1, 2014 through November 30, 2017 (the audit period).

2. During the audit period, the LLC operated a restaurant located at 3363 E. Tremont Ave., Bronx, New York, called Made in Puerto Rico Latin Cuisine and Sports Bar.

3. During the audit, the LLC and the LLC's managing member, petitioner Jacqueline Acevedo Villanueva (Ms. Villanueva), were represented by certified public accountant Sal Merante. Ms. Villanueva signed powers of attorney on behalf of the LLC and herself authorizing such representation. In addition, during the course of the audit, Ms. Villanueva, signed consents extending the statute of limitations within which to assess tax.

4. On September 19, 2017, the auditor called Mr. Merante to discuss the audit. It was revealed at that time that the LLC did not keep or maintain a general ledger or trial balance. When the auditor questioned Mr. Merante about the nontaxable sales claimed on the LLC's sales tax filings, Mr. Merante responded that those sales were for catered events. At that point, the auditor informed Mr. Merante that catered sales were taxable and requested any exemption documents. Also during that call, Mr. Merante indicated that bank statements would be provided for the audit period and an initial conference was scheduled.

5. Subsequently, the Division performed a survey of the restaurant on February 2, 2018. The restaurant was doing business as Made in Puerto Rico, serving both food and alcoholic beverages.

6. Because the auditors confirmed that reported gross sales were more than the credit card sales per the merchant card reports that they reviewed, the LLC's reported gross sales on its sales tax returns were accepted as filed.

7. An application for a sales tax certificate of authority for the LLC, dated January 1, 2013, provided that Ms. Villanueva is its responsible person. The application gives her email address on the form and states her title is "President."

8. On or about January 24, 2018, the Division's auditor spoke with Ms. Villanueva who requested a postponement of an upcoming audit appointment as petitioners had retained a new representative and the prior representative had not transferred all the records to her. On February 1, 2018, the Division's auditor emailed his supervisor advising her that Ms. Villanueva postponed the upcoming audit appointment and that Ms. Villanueva had also advised him the business had ceased operating in May 2017. Subsequently, on March 30, 2018, Ms. Villanueva claimed that she sold the LLC on March 9, 2015. On July 5, 2018, Ms. Villanueva presented a one-page contract signed by her and purportedly by the purchaser of the LLC, Jose Torres, which indicates Mr. Torres purchased the LLC for \$75,000.00.

9. The Division's auditors questioned the authenticity of the March 9, 2015 contract; subsequently, petitioners proffered another document entitled "Bill of Sale" wherein Ms. Villanueva indicates that she transferred the LLC to Mr. Torres on March 9, 2015. This document was signed by Ms. Villanueva and notarized on February 6, 2019.

10. The LLC's bank statements for the period May 2014 through February 28, 2015 indicate that the LLC was doing business as Siete Ocho Siete. The business name was changed on or about April 20, 2015, to Made in Puerto Rico Latin Cuisine and Sports Bar. The name change was filed by Dalal Associates CPA and signed by Jose Torres. The capacity listed for Mr. Torres is "authorized person."

11. On March 5, 2019, the LLC was issued notice of determination, notice number L-049513097, asserting sales tax plus interest and penalties for the period June 1, 2014 through February 28, 2015. The tax asserted is based upon the disallowance of the claimed nontaxable sales reported on its sales tax returns because exemption documents were never provided to the auditors during the audit.

12. On March 6, 2019, Ms. Villanueva was issued notice of determination notice number L-049515451 asserting sales tax plus interest and penalties for the period June 1, 2015 through February 28, 2017, as responsible person of the LLC.

13. The Division made the determination that Ms. Villanueva was a responsible person for the LLC because she signed the federal partnership returns for 2015 and 2016;<sup>1</sup> third party reports indicated that the LLC made purchases of liquor using Ms. Villanueva's liquor license; Ms. Villanueva signed a DTF-17, application to register for a sales tax certificate of authority (COA application), on January 30, 2013, and a COA renewal was issued to her on September 29, 2016. The COA application was filed by Dalal Associates. In addition, the LLC filed its final sales tax return June 20, 2017, using Ms. Villanueva's home address. The federal partnership returns indicate Ms. Villanueva's owned 99% of the LLC in both 2015 and 2016.

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<sup>1</sup> It is noted that the returns contained in the Division's audit file do not contain a physical signature.

14. In addition to the documentation contained within the audit file, the Division also submitted, as part of its motion evidence, that Ms. Villanueva appeared before the New York State Liquor Authority on behalf of the LLC at various times during 2016 and 2017, representing herself as the principal of the LLC d/b/a Made in Puerto Rico.

15. Amongst the documents submitted by the Division is a document entitled “Asset Purchase Agreement,” signed on December 1, 2016, between the LLC and Fabricio Alonzo, president of MIPR, Inc. This agreement is purportedly signed by Ms. Villanueva as president of the LLC. The Asset Purchase Agreement purports to transfer the LLC’s assets to MIPR, Inc.

16. The Division also submitted an affidavit of Ms. Villanueva sworn to on November 3, 2017, and submitted to the New York State Liquor Authority that addresses possible issues concerning MIPR., Inc.’s liquor license application for the sale of liquor at 3363 E. Tremont Ave., Bronx NY 10461. In her affidavit, she avers that she and the LLC have been the tenant in possession of the restaurant located at 3363 E. Tremont Avenue, Bronx, NY 10461 since she signed the original lease as the tenant on September 1, 2012 with the landlord Montemurro Enterprises, LLC (the landlord). In this affidavit she states that throughout the summer of 2015, she attempted to sell the restaurant, but this transaction was abandoned. In her affidavit, she specifically states “To be clear, I have been in possession of the premises as the principal of Thirty 3 Sixty 3, LLC at 3363 E. Tremont Avenue, Bronx, NY 10461 from the date of my original lease dated September 1, 2012 to August 10th, 2017- the date of the closing.”

17. The landlord’s principle, Cosmo Montermuro, and the principal of MIPR Inc., Mr. Alonzo, also submitted similar affidavits to the New York State Liquor Authority consistent with Ms. Villanueva’s account of what transpired as stated in her affidavit.

18. In opposition to the Division's motion and in support of their cross-motion, petitioners submitted numerous exhibits including a multipage document denominated as an affidavit signed by Ms. Villanueva on November 18, 2021. Included therein are numerous allegations as to Mr. Torres' involvement with the LLC and Ms. Villanueva's lack of authority over the LLC subsequent to the alleged sale of the LLC to Mr. Torres. The statements in the documents are not sworn to or notarized, nor does the document indicate where it was signed.<sup>2</sup> The following statement appears directly before Ms. Villanueva's signature: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

19. In petitioners' submission, the tax asserted due against the LLC is not contested; rather the focus of the response and cross-motion is that petitioner Ms. Villanueva was not a person responsible for the collection and remittance of the LLC's sales tax obligations during the period in issue.

20. Amongst the documents submitted, petitioners submitted a copy of a notice of eviction for an eviction action commenced by the landlord against Ms. Villanueva d/b/a Thirty 3 Sixty 3 Steakhouse, 3363 Tremont Avenue, Bronx, New York 10461, dated March 18, 2015. In addition, petitioner submitted a notice indicating that the New York City marshal had legal possession as of March 31, 2015. No explanation was provided as to the relationship between Thirty 3 Sixty 3 Steakhouse and the LLC.

21. Petitioners also submitted copies of bank signature cards and bank statements for the LLC's bank accounts at Chase Bank. Ms. Villanueva is not listed as an authorized signatory on

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<sup>2</sup> Ms. Villanueva's petition filed in this matter provides a New Jersey address.

these accounts. The majority of the checks issued from these accounts appear to have been signed by Jose Torres.

22. Petitioners also submitted a handwriting opinion of Bart Baggett, a forensic document examiner, dated July 29, 2021. The opinion letter states that, based upon his review of known handwriting samples of Ms. Villanueva, it is his conclusion that she did not sign the December 1, 2016 Asset Purchase Agreement or a May 1, 2017 assignment of lease. The May 1, 2017 assignment of lease was obtained by petitioners from the Division, which had obtained same from the New York State Liquor Authority. The May 1, 2017 assignment of lease purportedly is for the assignment of a February 1, 2013 lease between the landlord and the LLC to MIPR, Inc., for the premises located at 3363 East Tremont Avenue, Bronx, New York.

23. It is petitioners' contention that Ms. Villanueva transferred the LLC to Jose Torres on March 9, 2015, and he continued operate the restaurant located there through the LLC and then through MIPR, Inc. Petitioners' attorney served a subpoena on Mr. Alonzo, who called his office and indicated he would not, or could not, comply with the information sought by the subpoena.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" and the moving party is entitled to a favorable determination as a matter of law (20 NYCRR 3000.9 [b] [1]).

B. Section 3000.9 (c) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment

motion must make prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must...produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

C. By its motion, the Division has set forth a prima facie case that summary determination is warranted against the LLC. The basis for the tax asserted due against the LLC is the disallowance of exemptions claimed by it alleged to have been made by providing catering services. The LLC has not disputed the tax asserted against it. Instead, the focus of the LLC and Ms. Villanueva has been on whether Ms. Villanueva was a responsible person for the collection and remittance of sales tax on behalf of the LLC during the period in issue. Here, there is no dispute that the LLC was doing business and making taxable sales as evidenced by its sales tax filings. Having set forth a prima facie case that summary determination is warranted, it was incumbent upon petitioner LLC to submit “evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . .” (*Zuckerman*). The LLC has not done so.



Therefore, summary determination is granted in the Division's favor as to the liability of the LLC.

D. With respect to petitioner Ms. Villanueva, her liability, as noted, is premised on her alleged status as a responsible person of the LLC. In this regard, 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." In turn, 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*" (emphasis added).

E. First, it is noted that the Tax Law contains no factors to qualify or limit the liability imposed upon members of partnerships or limited liability companies (*Matter of Bartolomei*, Tax Appeals Tribunal, April 3, 1997; *Matter of Santo* Tax Appeals Tribunal, December 23, 2009). Clearly, Tax Law § 1131 (1) provides that any member of a partnership or any member of a limited liability company is a "person required to collect any tax imposed by this article" and, as provided in Tax Law § 1133 (a), a member of a limited liability company "shall be personally liable for the tax imposed, collected or required to be collected under this article." Accordingly, if Ms. Villanueva was a member of the LLC during the audit period, she would be personally liable for the sales tax required to be collected and remitted to the state. In addition, regardless of whether she had relinquished her membership in the LLC, individual liability is not limited to owners or officers, directors, and employees of a business. Whether an individual is personally liable for tax under Tax Law § 1131 (1) 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]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The pivotal question is whether the individual had or could have had sufficient authority and control over the affairs of the corporation (*see Matter of Ianniello*, Tax Appeals Tribunal, November 25, 1992, *confirmed* 209 AD2d 740 [3d Dept 1994]). Factors to be considered include the individual's status as an officer, the individual's knowledge of and control over the financial affairs of the corporation, the authority to write checks on behalf of the corporation, responsibility for maintaining the corporate books, authority to hire and fire employees, and the individual's economic interest in the corporation (*see Matter of Kieran*, Tax Appeals Tribunal, November 13, 2014; *Matter of Ianniello*; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990; *Matter of Cohen* at 1023). As noted by the Tribunal:

“The factual determination demands a consideration of all the surrounding circumstances and involves more than the matching of the traditional indicia of responsibility to an officer's surface acts. Indeed, a person's officer status can be offset by the circumstances, such as where the officer's actions were done under the supervision and control of persons later convicted on criminal racketeering charges . . . . Further, the lack of an official title in a corporation should not shield an individual from responsibility where that individual in fact controls the corporation” (*Matter of Ianniello*).

Thus, regardless of whether petitioner was a member or an officer or employee of the LLC, she could still be found liable for the sales tax assessed against it (*see Matter of Kieran* [“holding of corporate office is one such factor, but is not determinative”]). In *Matter of Ianniello*, petitioners, who were neither officers, directors nor employees of the company against which tax was assessed, were determined to be personally liable.

F. In this case, neither the Division nor Ms. Villanueva have shouldered their burden of establishing summary determination is warranted with regard to Ms. Villanueva in either of their respective favors. Here, after careful review of the evidence submitted on the motions, there are material issues of fact necessitating a full hearing. “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*McKenna v McKenna*, 121 AD3d 864, 865 [2d Dept 2014] [internal quotation marks and citation omitted]). The record contains conflicting proof as to whether Ms. Villanueva still held her membership interest in the LLC and/or the extent of her involvement with the LLC subsequent to the alleged sale. For instance, petitioner claims that she transferred her interest in the LLC prior to the period in question as evidenced by the contract of sale she claims was executed to transfer the LLC to Jose Torres on March 9, 2015.<sup>3</sup> In its motion papers, the Division tendered proof that she was still involved with the LLC subsequent to the alleged transfer as evidenced by the LLC’s various tax filings and her appearances before the New York State Liquor Authority. These documents cast doubt on her claim that she was no longer involved. Likewise, the Division tendered an asset purchase agreement purportedly signed by Ms. Villanueva as member of the LLC wherein the LLC allegedly transferred its assets to MIPR, Inc. In contrast, Ms. Villanueva submitted a

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<sup>3</sup> Petitioner has made numerous allegations in an unsworn certification denominated as an affidavit. This “affidavit” is not notarized nor sworn to. Instead, the submission appears to be a certification in lieu of an affidavit (*see* NJ Rule 1:4-4 [b]). Such certification has no evidentiary value in New York and is therefore rejected (*see New Millennium Psychological Services, P.C. as Assignee of Christine Waters v Unitrin Advantage Insurance Company*, 32 Misc3d 69 [Sup Ct, NY County 2011]). Such certification, while permissible in certain circumstances in New Jersey (*see Cornblatt v Barow*, 153 N.J. 218 [1998]), is not permitted in New York. As noted by the Court in *Cornblatt*, “[t]he commentary to the rule states: ‘As a cautionary note, the limitation of the scope of paragraph (b) to affidavits, oaths and verifications required by the rule calls attention to the fact that the rule does not apply to documents required exclusively by a statute which does not incorporate court rules’” (*Cornblatt*, citing Pressler, Current N.J. Court Rules, comment 2 on R. 1:4-4(b) [1996]). Here, the New York CPLR does not incorporate New Jersey Court Rules. Accordingly, in the absence of a properly executed affidavit by Ms. Villanueva and/or an individual with personal knowledge of the facts, the statements contained in her submission cannot be accepted as fact (*see Matter of Radiology Today, P.C. ex rel. Rodriguez v New York Cent. Mut. Fire Ins. Co.*, 4 Misc.3d 1021 [A]; 2004 NY Slip Op. 50988 [U] [Civ Ct, Kings County 2004]).

handwriting opinion that concludes that she did not sign such agreement or an assignment of the LLC’s lease for the property the restaurant operated out of. Petitioners also attempt to paint a picture of fraud and deceit by Mr. Torres, the alleged purchaser of the LLC. Here, a motion for summary determination is not suitable to make such a determination as the determination of who is, or who is not, a responsible person, is a highly factual inquiry. At this point, it is not the function of an administrative law judge to render determination on whether Ms. Villanueva was, or was not, a responsible person of the LLC during the period in issue, but rather to determine whether such issues exist (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). “Since it [summary determination] deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Here, it is clear that there are material issues of fact warranting the denial of the Division’s motion for summary determination and petitioner’s cross-motion for summary determination with respect to petitioner Ms. Villanueva.

G. Based upon the foregoing, the Division of Taxation’s motion for summary determination is granted with respect to petitioner Thirty 3 Sixty 3 LLC, petitioner Thirty 3 Sixty 3 LLC’s cross-motion for summary determination is denied, the March 5, 2019 notice of determination is sustained and the petition of Thirty 3 Sixty 3 LLC is denied; the Division of Taxation’s and petitioner Jacqueline Acevedo Villanueva’s motion and cross motion for summary determination are denied, and the matter of the petition of Jacqueline Acevedo Villanueva will be scheduled for a hearing in due course.

DATED: Albany, New York  
July 14, 2022

-                                 /s/                                Kevin R. Law  
ADMINISTRATIVE LAW JUDGE