

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MOHAMED ZINDANI</b>	:	ORDER
	:	DTA NO. 823733
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, 2006 through May 31, 2008.	:	

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Petitioner, Mohamed Zindani, 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, 2006 through May 31, 2008.

Petitioner, by his representative, Jacqueline S. Antonious, Esq., brought a motion dated October 13, 2010 seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Together with the Notice of Motion, petitioner filed an affidavit of Mr. Zindani, an affidavit of Mr. Almoliki and attached exhibits.

The Division of Taxation, by its representative Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel), filed an Affirmation in Oppositon, dated November 3, 2010, and four attached exhibits, in response to petitioner's motion.

Petitioner submitted a memorandum in reply dated November 9, 2010, and one attached exhibit. Accordingly, the 90-day period for the issuance of this order began on November 9, 2010.

After due consideration of the motion papers, affirmation, affidavits, exhibits, and all pleadings and proceedings had herein, Thomas C. Sacca, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner has established that there are no material and triable issues of fact and that the law and the facts presented mandate a determination as a matter of law in his favor cancelling a Notice of Determination.

***FINDINGS OF FACT***

1. On May 18, 2009, the Division of Taxation (Division) issued to petitioner, Mohamed Zindani, a Notice of Determination of sales and use tax due in the amount of \$67,053.03, plus penalty and interest, for the period March 1, 2006 through May 31, 2008. The notice states that it was being issued because petitioner had been determined to be an officer or responsible person of 113-21 Jamaica Deli, Inc., for taxes determined to be due therefrom.

2. On July 2, 2010, the Bureau of Conciliation and Mediation Services issued a Conciliation Order reducing the tax determined to be due to \$44,928.56, plus penalty and interest.

3. Petitioner's motion challenges the Division's assessment on the basis that petitioner was not an officer or responsible person of 113-21 Jamaica Deli, Inc. Petitioner alleges that he was a mere employee, with no authority to act for the business without the approval and permission of the owner, received only wages from the corporation and signed sales tax returns and corporate checks in payment of the sales tax due only at the owner's direction.

4. In its Affirmation in Opposition, the Division notes petitioner's signature on sales tax returns, his officer status, his stock ownership and his compensation received as an officer of 113-21 Jamaica Deli, Inc.

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

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion 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 that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

B. The standard with regard to a motion for summary determination has been set forth numerous times. A motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR." (20 NYCRR 3000.9[c]; *see also Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue [citation omitted]" (*Moskowitz v. Garlock*, 23 AD2d 943, 944 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312 [1989]). Because it is the "procedural equivalent of a trial" (*Museums at Stony brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [1989]), undermining the notion of a "day in court," summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 94 [1965], *affd* 26 AD2d 729 [1966]). If any material facts are in dispute, if the existence of a

triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (*see Gerard v. Inglese*, 11 AD2d 381 [1960]).

C. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

D. Whether a person is an officer or employee liable for tax must be determined upon the particular facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564 [1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862 [1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239 [1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner’s regulations, include whether a person is authorized to sign the corporation’s tax returns, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

E. In *Matter of Taylor* (Tax Appeals Tribunal, October 24, 1991), the Tribunal summarized the standards for determining whether an individual falls within the category of responsible person as follows:

Whether a person is a “responsible officer” under Articles 28 and 29 of the Tax Law is determined by Tax Law §§ 1131(1) and 1133(a), which articulate who may be held personally liable for the collection and remittance of sales tax. Section 1131(1) sets forth, in relevant part, that “any officer, director or employee of a corporation or of a dissolved corporation . . . who . . . is under a duty to act for such corporation . . . in complying with any requirement of [Art. 28]” of the sales tax law is also responsible for collecting and paying over taxes due by the

corporation (emphasis added). The responsible officer incurs personal liability through section 1133(a) of the Tax Law which holds 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.”

Case law makes clear that the mere holding of a corporate office does not, in and of itself, impose tax liability on a person (*see, Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427, 430 [1978]; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). Rather, whether a person is a “responsible officer” required to collect sales and use taxes is a factual determination (*see, Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564 [1987]; *Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448 [1975]; *Chevlowe v. Koerner*, *supra*, 407 NYS2d 427, 429; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862 [1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *affd*, 558 NYS2d 239 [1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). This factual determination, according to the Division's regulations, generally depends upon whether the person is authorized to sign the corporation's tax returns, is in charge of maintaining corporate records, or is responsible for managing the corporation (20 NYCRR 526.11[b][2]). A study of the relevant case law suggests consideration of the following indicia of responsibility in a “responsible officer” determination: status as an officer, director, or stockholder (*Matter of Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 564, 565); the derivation of substantial income from the corporation or stock ownership (*Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536 [1986], *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027 [1987]); day-to-day responsibilities, involvement with and knowledge of the financial affairs and management of the corporation, as well as the individual's duties and functions set forth in the certificate of incorporation and bylaws (*Vogel v. New York State Dept. of Taxation & Fin.*, *supra*, 413 NYS2d 862, 865); ability to hire and fire employees (*Chevlowe v. Koerner*, *supra*, 407 NYS2d 427, 429); and authorization to sign the corporate tax returns and checks (*Matter of Cohen v. State Tax Commn.*, *supra*; *Chevlowe v. Koerner*, *supra*, 407 NYS2d 427, 429).

F. Upon review of all of the documents presented in the present matter, as well as the relevant case law, it is clear that there exist material facts that are in dispute, and thus it is not appropriate to resolve this matter by summary determination. In this regard petitioner, as the proponent of summary determination, sets forth allegations of fact and error in his notice of motion that give rise to the disputed facts. By disputing the fact of his responsibility for the taxes

determined to be due from the corporation, petitioner disputes the conduct that is the underlying premise for the imposition of the tax, penalty and interest in question. The record on this motion contains conflicting documentation alleging facts that are properly resolved by a hearing where both parties will have the opportunity to present testimony and such documentation in support of their respective positions.

G. In light of the foregoing conclusion that there exist material facts that are in dispute, summary determination is not appropriate and will not be granted in petitioner's favor.

H. Petitioner's motion for summary determination is hereby denied, and this matter shall proceed to hearing in due course.

DATED: Troy, New York  
January 20, 2011

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE