STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION DTA NO. 823608
PATRICK KIERAN	:	
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 June 1, 2006 through August 31, 2007.	:	

Petitioner, Patrick Kieran, 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 June 1, 2006 through August 31, 2007.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 1384 Broadway, New York, New York, on October 11, 2012, at 10:30 A.M., with all briefs to be submitted by March 29, 2013, which date began the six-month period for the issuance of this determination. Petitioner appeared by David C. Sobel, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Michael B. Infantino, Esq., of counsel). After due consideration of the documents and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation can proceed against petitioner for the sales and use tax liabilities of Bay Chevrolet, Inc., for the quarter ended August 31, 2006.

II. Whether petitioner was personally liable for the sales and use taxes due on behalf of Bay Chevrolet, Inc., as a person required to collect and pay such taxes under Tax Law § 1131(1) and § 1133(a).

FINDINGS OF FACT

1. Patrick Kieran (petitioner) is the former president of Bay Chevrolet, Inc. (Bay Chevrolet), and the Division of Taxation (Division) assessed petitioner for Bay Chevrolet's sales and use tax deficiencies for the periods in issue as a responsible person pursuant to Tax Law §§ 1131 and 1133.

2. Bay Chevrolet was a General Motors Corporation (GM) authorized car dealership operating in Douglaston, New York.

3. Previous to petitioner's ownership of Bay Chevrolet, since 1978, petitioner had a great deal of experience with automobile dealerships. He was involved with a Dodge dealership, two Mitsubishi dealerships, a Hyundai dealership and two Chevrolet dealerships.

4. Petitioner's involvement with Bay Chevrolet commenced in 2005, when he bought the franchise from GM for $1,050,000.00, with an investment of his own funds, money from investors that petitioner secured, and financing by General Motors Acceptance Corporation (GMAC), a related corporation. At that time, petitioner was required to execute a dealer sales and service agreement with GM, which set forth the specifics of the required manner in which petitioner would operate the dealership. Pursuant to the dealer sales and service agreement, petitioner was required to engage GMAC, or some other creditworthy financial institution reasonably acceptable to GM, to support Bay Chevrolet's floor plan line and its purchase of new vehicles.

5. Bay Chevrolet opted to finance its inventory purchases through a floor plan financing arrangement with GMAC, along with additional working capital financing in the amount of $600,000.00. This financing arrangement is typical for GM authorized car dealerships. The financing arrangement including its "sweep arrangement" afforded GMAC access to Bay Chevrolet's bank accounts, which included payment by customers for the purchase price of vehicles, parts and accessories and automobile repair services, along with related New York State sales taxes collected from these customers. When Bay Chevrolet's business was ultimately in trouble, GMAC exercised its rights under the sweep arrangement, collecting what was due from the company directly from Bay Chevrolet's bank accounts, which included sales and use taxes collected from customers.

6. Bay Chevrolet initially failed to file its sales and use tax returns for the quarters ending November 30, 2006, February 28, 2007, May 31, 2007 and August 31, 2007, and the Division of Taxation (Division) accordingly issued four notices of estimated determination dated May 5, 2008 to petitioner as a responsible officer of Bay Chevrolet, as follows:

Period	Assessment No.	Estimated Sales Tax
9/1/06-11/30/06	L-029928710	$236,044.56
12/1/06-2/28/07	L-029928709	$354,066.84
3/1/07-5/31/07	L-029928708	$354,066.84
6/1/07-8/31/07	L-029928707	$354,066.84

7. The sales tax returns for the following quarters were thereafter filed late, with partial or no remittance with the filing, as follows:

Period	Assessment No.	Tax Due per sales tax return	Remittance	Tax Due
9/1/06-11/30/06	L-029928710	$81,907.14	$7,500.00	$74,407.14

12/1/06-2/28/07	L-029928709	$52,043.23	0	$52,043.23
3/1/07-5/31/07	L-029928708	$41,895.20	0	$41,895.20
6/1/07-8/31/07	L-029928707	$15,236.30	0	$15,236.30

8. The notices of estimated determination in Finding of Fact 6 were adjusted to reflect the tax due for each of the returns as filed (Finding of Fact 7), plus penalties and interest.

9. Assessment L-029928711, a fifth notice, was also at issue. The corporation filed one of its part-quarterly sales tax returns late for the quarter August 31, 2006. A Notice of Determination dated May 5, 2008 was issued by the Division to petitioner for that quarter (L-029928711), asserting sales tax due in the amount of $160,010.39, plus penalties and interest, with assessment payments and credits of $57,909.28 applied thereto.

10. The Division issued to petitioner a Consolidated Statement of Tax Liabilities dated May 15, 2009, concerning all five notices. Assessments L-029928707, L-029928708, L-029928709, and L-029928710 listed the sales tax due as set forth in Finding of Fact 7, and included the $7,500.00 payment on Assessment L-029928710 when listing the tax due.

Separately, the Consolidated Statement listed Assessment L-029928711 for the tax period ended August 31, 2006, showing the tax amount due as $160, 010.39, plus penalties and interest, and assessment payments and credits in the amount of $245,507.08, resulting in a "current balance due" of zero.

11. Petitioner requested a Conciliation Conference before the Bureau of Conciliation and Mediation Services (BCMS). It was held on October 8, 2009, and according to the Conciliation Order, all five statutory notices were sustained pursuant to CMS No. 231947 dated January 29, 2010.

12. The BCMS Conciliation Consent form issued to petitioner concerning the five notices reflected the same tax due amounts, plus penalties and interest, as those set forth in Finding of Fact 7 for the four notices, and as to Assessment No. L-029928711, tax due in the amount of $160,010.39, plus penalties and interest totaling $245,507.08. On the Consent form, Assessment No. L-029928711 also reflected a payment in the amount of $245,507.08, with no balance due. There is no evidence that the Consent was ever signed or executed by petitioner.

13. A timely petition was filed with the Division of Tax Appeals on April 28, 2010, protesting the Conciliation Order. The petition lists all five notices, but indicates in the petition that "tax amount determined was $183,581.57 and the amount of tax contested is $183,581.57."[1]

14. On or about August 11, 2010, the Division filed its answer, in which the Division stated:

> AFFIRMATIVELY STATES that, the corporation late-filed one of its part quarterly returns in the quarter ending 8/31/06: the June, 2006 return was due on 7/20/06, but was not filed until 7/27/06.
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> * * *
>
> AFFIRMATIVELY STATES that, by the foregoing, a Notice of Determination for that quarter (#L-029928711) was issued to the Petitioner, *but has since been fully paid by another party*, and the Petitioner paid none of the tax, penalty and interest (emphasis supplied).

15. The Division's CARTS-Assessments Receivable system indicated that as of October 2, 2012, the balance of tax due for Assessment L-029928711-1 was $105,679.11, plus penalties and interest,[2] and as of September 27, 2012, the balances of tax due for Assessments L-

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[1] The tax due on Notices L-029928710-2, L-029928709-2, L-029928708-3, L-029928707-4 total $183,571.87.

[2] The Division does not provide an explanation for the discrepancy between the Consolidated Statement of Tax Liabilities (showing a zero balance), the Division's answer (stating the balance is paid in full), and the CARTS printout of the amount due ($105,679.11) for Assessment L-029928711.

029928710-2, L-029928709-2, L-029928708-3, L-029928707-4 were $74,407.14, $52,043.23, $41,895.20, and $15,236.30, respectively, plus penalties and interest.

16. The Division submitted into evidence a Form CT-6, Election by a Federal S Corporation to be Treated As a New York S Corporation, which listed four owners of 25 shares of stock of Bay Chevrolet, including petitioner as one of the shareholders. The document was date stamped as received by the Division's Corporate Tax Registration unit on September 26, 2005.

17. The Division's auditor made a field visit to Bay Chevrolet in early 2008, after the case was assigned to her, but found the business had already been closed down.

18. The Division's auditor also attempted to collect the amounts at issue in this case from three other people.

19. Petitioner was responsible for the day-to-day operations of Bay Chevrolet. He dealt with GM and GMAC on all significant business matters, ordered inventory, hired and fired employees, and signed checks, tax returns and bank documents.

20. The Division submitted into evidence the New York State and Local Sales and Use Tax Return for Part-Quarterly period June 1, 2006 through June 30, 2006, signed by petitioner on July 26, 2006, showing an amount due of $64,058.98. A check signed by petitioner dated July 26, 2006 in the amount of $64,058.18[3] was attached to the return.

The Division submitted into evidence the New York State and Local Sales and Use Tax Return for Part-Quarterly period July 1, 2006 through July 31, 2006, signed by petitioner on August 21, 2006, showing an amount due of $54,998.29. A check signed by petitioner dated August 21, 2006 for the same amount was attached to the return.

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[3] No explanation as to the difference in amounts was provided.

The Division submitted into evidence the New York State and Local Quarterly Sales and Use Tax Return for Part-Quarterly period June 1, 2006 through August 31, 2006, signed by petitioner[4] on September 20, 2006, showing an amount due of $235,010.39. A check signed by petitioner dated September 20, 2006, in the amount of $75,000.00, was attached to the return.

21. The Division also submitted into the remaining New York State and local sales and use tax returns for part-quarterly filers and the New York State and local quarterly sales and use tax returns for the periods covering September 1, 2006 through August 31, 2007, all of which were signed by someone other than petitioner.

22. Four business signature cards created on July 29, 2005, for separate bank accounts of Bay Chevrolet, bore the signature of petitioner as president. Three other names and signatures also appeared on the signature cards.

23. Another account, referred to as the debtor in possession account was opened on July 27, 2007, and bore the printed name and signature of petitioner as president. No other names were listed on this account.

24. The auditor collected a sampling of checks from Bay Chevrolet's books. One dated February 16, 2007 was made out to AFC; a second dated August 21, 2007 was made out to the New York State Insurance Fund; and two others were payroll checks dated August 31 and October 4, 2007, respectively. All were signed by petitioner as president of Bay Chevrolet.

25. On January 9, 2009, the Division's auditor issued a Subpoena Duces Tecum to General Motors Corporation (GM) requesting the production of documents concerning Bay Chevrolet. Pursuant to that request, the auditor received a GMAC Dealer Sales and Service

[4] Although the Division's auditor testified that this signature did not appear to be petitioner's, it is found to be substantially similar enough to other signatures identified without challenge to be petitioner's signature.

Agreement dated September 20, 2005, signed by petitioner and the regional general manager for GMAC, establishing that the parties agreed that petitioner would be the dealer operator of Bay Chevrolet, and that petitioner would provide personal services in this regard.

26. A Dealer Statement of Ownership for Bay Chevrolet was submitted as part of the record. It listed four owners, including petitioner, all of whom were active in the dealership, owned 50 shares, and a 25% ownership interest. Further documents submitted as part of the record that appear to involve an acquisition of Douglaston Chevrolet list information concerning all four owners of Bay Chevrolet. Amidst that information, all of the owners of Bay Chevrolet except petitioner are described as "financial investor," though two of them were listed as vice presidents of Bay Chevrolet. Petitioner was the only owner listed as "Dealer Owner/Operator," and the submitted documents noted his company position as president. Petitioner's signature in his capacity as president of Bay Chevrolet appears on the last page of this grouping of documents.

27. Bay Chevrolet leased dealership space from a company referred to as Argonaut, a wholly-owned subsidiary of GMAC. The status of the lease at the time of the closing of Bay Chevrolet, is that the corporation owed Argonaut approximately $400,000.00 in back rent.

28. Bay Chevrolet had four separate bank accounts: 1) an investment account, when there were excess funds to invest; 2) a payroll account that was set up so that the outside service provider handling payroll could sweep this account to meet payroll; 3) a general account that was used for everyday operations of the business; and 4) an account used to put plates on cars by the Department of Motor Vehicles. When the business met with financial troubles, the general account was then controlled entirely by GMAC, whose access would dictate how much would be taken out to meet payroll.

29. Petitioner's representative introduced into evidence a motion filed by GM in August 2007 for a declaration confirming the termination of the dealer agreement with Bay Chevrolet or some alternative relief. The purpose of the submission was to confirm portions of petitioner's testimony regarding the relationships between Bay Chevrolet and various parties to the business.

30. The GM motion set forth as its basis to seek termination of the dealer agreement, the following:

> After the Debtor's [Bay Chevrolet] prolonged failure to pay its rent, its taxes or its other obligations in a timely manner, afer its floor plan credit line had been suspended for well in excess of a year, after it failed to submit a financial statement to GM as required for over six months, after its operations had all but ceased, and after its efforts to sell its assets failed due to its own actions, GM took the entirely justified step of terminating the Dealer Agreement effective July 26, 2007 because of the dealership's obvious and paralyzing insolvency and its resulting inability to fulfill even the most basic obligations under its Dealer Agreement.

31. The GM motion confirmed that Bay Chevrolet was free to choose from a number of banks or other financing institutions for its floor plan arrangements, but that the company chose to use GMAC, a separate corporation in which GM maintains a minority ownership interest. As a part of the security for its floor plan arrangement, Bay Chevrolet granted GMAC an assignment in any proceeds from its open account with GM.

32. According to the motion, GM terminated Bay Chevrolet's dealer agreement effective July 26, 2007 and stated that Bay Chevrolet did not challenge GM's grounds for such termination or otherwise seek to obtain any injunctive relief to prevent the termination from becoming effective. At no time during the hearing did petitioner introduce into evidence anything that would contradict the circumstances relied upon by GM for the termination of its dealer agreement, or the allegations set forth in the motion.

33. Petitioner's representative could not shed any light on the result of the motion filed by GM, and only offered that he believed that the bankruptcy proceedings were suspended.

34. Petitioner was granted permission by the administrative law judge to submit post-hearing the financing agreements between Bay Chevrolet and GMAC. Petitioner was unable to locate these agreements in his own records and prior requests made for the same from GMAC remained unanswered. In lieu thereof, petitioner obtained the 2012 Wholesale Electronic Funds Transfer (EFT) Authorization, also known as the "Sweep Agreement" between a current Hyundai dealership and Hyundai Capital America, Inc., a company that provides automobile and other financing arrangements to Hyundai dealerships. Petitioner believes the sweep arrangement is substantially similar to an agreement required by GMAC of Bay Chevrolet in entering into the finance agreements with GMAC.

35. The Division has agreed to the voluntary abatement of all penalties in this matter.

SUMMARY OF THE PARTIES' POSITIONS

36. Petitioner maintains that the conciliation conferee's proposed resolution (the Consent) and the subsequent Conciliation Order, unequivocally reflect a zero liability for the quarter ended August 31, 2006, and given the binding nature of the Order, the Division cannot now proceed against petitioner for this quarter.

Petitioner argues that he is not a responsible person for Bay Chevrolet's tax obligations under the Tax Law because he did not have control over the payment of the company's taxes during the assessment period.

37. The Division argues that although the BCMS conferee offered petitioner a consent for the five-quarter liability that included a zero balance due for the period ending August 31, 2006, it is undisputed the consent was not signed and a Conciliation Order was issued sustaining

all five notices. Thus, the Division concludes that petitioner's argument concerning the quarter ending August 31, 2006 is without merit.

The Division maintains that petitioner had all the indicia of a responsible person of Bay Chevrolet and exercised such authority on a daily basis on behalf of the corporation. The Division further asserts that petitioner's defense that GM and GMAC precluded him from exercising his authority by seizing the funds of the corporation, including the New York sales and use taxes, is without merit, since petitioner voluntarily entered into an agreement that permitted such seizure of funds in the possession of Bay Chevrolet.

The Division finally argues that the post-hearing submission of the sweep agreement from a dealership and finance company unrelated to petitioner and Bay Chevrolet, covering a time frame outside the audit period, should be deemed irrelevant and immaterial, and not permitted.

CONCLUSIONS OF LAW

A. Concerning the first issue, Tax Law § 170(3-a)(c) provides the following with respect to the powers and authority vested in the conciliation conferee:

> A conciliation conferee, all of whom, unless otherwise provided by law, shall be in the classified civil service, shall conduct the conciliation conference in an informal manner and shall hear or receive testimony and evidence deemed necessary or desirable for a just and equitable result. The commissioner of taxation and finance shall have the power to delegate authority to a conferee to waive or modify penalty, interest and additions to tax to the same extent as such commissioner is permitted under this chapter.

The regulations promulgated thereunder specifically address the situation where, after the conferee has reviewed all the evidence, a proposed settlement is made and forwarded to the party requesting the conference for his approval or disapproval. The regulation at 20 NYCRR 4000.5(c)(3) provides as follows:

> (I) After reviewing the testimony, evidence and comments, the conciliation conferee will serve on the requester a proposed resolution in the form of a consent. In developing this proposed resolution, the conciliation conferee may contact either party to clarify any issues or facts in dispute.
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> (ii) Where the proposal is acceptable to the requester, the requester shall have 15 days to execute the consent and agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the statutory notice.
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> (iii) Where the requester fails to agree with the proposed resolution and does not execute the consent within 15 days, the conciliation conference proceeding will be deemed concluded. The conciliation conferee shall render a conciliation order within 30 days after the conciliation conference proceeding is concluded.

B. In this case, at the conclusion of his BCMS conciliation conference, petitioner was provided with a proposed resolution, or "Consent," that indicated a zero balance due for the quarter ended August 31, 2006. The Consent was not signed by petitioner and subsequently, the conferee issued a Conciliation Order sustaining all five notices. The Order did not specify the tax due amounts for the notices. Petitioner was under the impression that the amounts stated on the Consent, specifically the zero balance due for the period ended August 31, 2006, were then incorporated into the Order.

Although the amounts on a consent form are usually a proposed resolution, often in the nature of a settlement, they are not necessarily the amounts incorporated into a conciliation order, though they could be the same. However, in this case, there are two reasons that petitioner may have reached the conclusion that the order represented a zero balance as to the period August 31, 2006. Prior to the October 8, 2009 conciliation conference, the Division of Taxation had issued to petitioner a Consolidated Statement of Liabilities dated May 15, 2009. The consolidated statement clearly showed the tax liability for the period ending August 31, 2006 as having been paid in full, and the balance due as of that date for that period as zero. After the conciliation conference, petitioner filed a timely petition protesting the Order, on or about April 30, 2010.

The Division's answer, as stated in the facts herein, indicated that "a Notice of Determination for that quarter [the quarter ending 8/31/06] (#L-029928711) was issued to Petitioner, but has since been fully paid by another party. . . ." Another discrepancy, the CARTS document that indicated a balance due for this quarter, was not explained or reconciled with the previously issued consolidated statement or the Division's answer.

The Division's answer was not amended and there was no proof offered that would support the Division's allegation that the quarter ending August 31, 2006 remained unpaid. The fact that the CARTS documents bore a different amount, without further supporting proof, does not dictate the amount due. On the basis of the Division's representation to petitioner in the Consolidated Statement of Liabilities that the balance due for the period ending August 31, 2006 was zero, coupled with the Division's Answer stating this assessment was paid in full, petitioner's conclusion that he can no longer be held liable for the quarter ending August 31, 2006 in the event he is found to be a responsible officer, is not only valid, but supported by the weight of the evidentiary record and the pleadings. Accordingly, if petitioner is determined to be a responsible officer of Bay Chevrolet, he cannot be held responsible for any amounts that might still be due concerning the taxes owed by Bay Chevrolet for the quarter ending August 31, 2006.

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. The mere holding of corporate office does not, per se, impose tax liability upon an office holder (***see Matter of Vogel v. New York State Dept. of Taxation & Fin.***, 98 Misc 2d 222,

413 NYS2d 862 [1979]; ***Matter of Chevlowe v. Corner***, 95 Misc 2d 388, 407 NYS2d 427 [1978]; ***Matter of Unger***, Tax Appeals Tribunal, March 24, 1994, ***confirmed sub nom Matter of Landau v. Tax Appeals Tribunal,*** 214 AD2d 857, 625 NYS2d 343 [1995], ***lv denied*** 86 NY2d 705, 632 NYS2d 498 [1995]). 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, 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]). 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 (***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 Barton***, [Tax Appeals Tribunal, December 28, 1989]; ***Matter of William F. Martin***, ***supra***; ***Matter of Autex***, ***supra***).

E. 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). 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 was thwarted by others in carrying out his corporate duties through no fault of his own [citations omitted]" (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

F. The facts of this case are quite straightforward. The evidence supported that petitioner had the authority to: manage the business with knowledge and control over financial affairs; pay or direct payments of credits; sign checks; sign tax returns; hire and fire employees; and conduct transactions with GM and GMAC. He was the only person who signed the Dealer Sales and Service Agreement as the "Dealer Operator," compared to the other owners who were designated as "financial investors." Petitioner consistently held himself out to banks, employees, GM, GMAC, and other persons and entities as the person in charge of Bay Chevrolet. In short, he exhibited all the necessary indicia, and these facts clearly establish that petitioner was an officer or responsible person of Bay Chevrolet pursuant to Tax Law § 1131[1]) and therefore personally liable for tax assessed against Bay Chevrolet pursuant to Tax Law § 1133(a) (***see Matter of Martin v. Commissioner of Taxation & Fin.***, 162 AD2d 890, 558 NYS2d 239 [1990]; ***Matter of Vogel v. New York State Dept. of Taxation & Fin.,*** 98 Misc 2d 222, 413 NYS2d 862 [1979]).

G. The basis for petitioner's defense in this matter is that GM and GMAC precluded him from otherwise exercising his authority as president and dealer operator to pay taxes as due, because the practical application of GMAC's "sweep" arrangement afforded GMAC control over Bay Chevrolet's bank accounts, including customer payments for the purchase price for vehicles,

parts and accessories, automobile repair services along with related sales and use taxes, under certain financial circumstances. The same issue was addressed in ***Matter of Button*** (Tax Appeals Tribunal, January 28, 2002), where the Tribunal found as critical the fact that petitioners in that case voluntarily created the scenario that led to their inability to pay the taxes due. In the ***Button*** case, the officers executed agreements and took similar risks to remain in business, granting a security interest and lien on all its accounts, wherever located. The Tribunal would not then permit the officers to shield themselves from the liability that they knew full well could be created if the business operations failed.

Petitioner voluntarily entered into the very agreement that empowered GMAC to seize the funds in the possession of Bay Chevrolet, including the sales and use taxes owed to the state. Petitioner had the option to enter into other financing arrangements with other institutions and otherwise protect the trust taxes. Petitioner's failure to pay the taxes cannot be excused and responsibility essentially transferred to the corporate entity with whom he agreed to conduct business and to whom he granted such authority. In addition, no consideration is given to the post-hearing submission of the sweep agreement from an unrelated corporation outside the audit period. The Division is correct in its assessment of that information as irrelevant and immaterial. Accordingly, petitioner has failed to carry his burden of proving that he should not be held as responsible officer for the four remaining quarters.

H. The petition of Patrick Kieran is granted to the extent noted in Conclusion of Law B, but is otherwise denied, and notices of determination L-029928707, L-029928708, L-029928709, and L-029928710 dated May 5, 2008, together with interest thereon, are sustained.

DATED: Albany, New York
September 12, 2013

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE