STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|---|---|---|
| In the Matter of the Petitions | : | |
| of | : | DETERMINATION |
| **VENIAMIN NILVA** | : | DTA NOS. 850525, 850526, 850527, AND 850528 |
| for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2016 through November 30, 2017. | : | |

Petitioner, Veniamin Nilva, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2016 through November 30, 2017.

On July 1, 2025, and July 2, 2025, respectively, petitioner, appearing by Armanino Advisory LLC (Mark L. Stone, CPA, and Jennifer Koo, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by December 18, 2025, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

## *ISSUES*

I. Whether petitioner was a person required to collect and remit tax under Tax Law §§ 1131 (1) and 1133 so that he is personally liable for sales tax determined due from White Plains Auto Company, LLC, for the period December 1, 2016 through November 30, 2017.

II. Whether petitioner has shown reasonable cause for the abatement of penalties.

## *FINDINGS OF FACT*

1. White Plains Auto Company, LLC (the company), was a New York limited liability company located at 500 Tarrytown Road, White Plains, New York, during the period December 1, 2016 through November 30, 2017 (the period at issue).

2. Petitioner, Veniamin Nilva, was a member of the company and held a 22% ownership interest in it during the period at issue.

3. Petitioner and Gary Flom formed the company sometime prior to 2014.

4. On October 20, 2014, petitioner entered into an amended and restated operating agreement (amended agreement) of the company with Gary Flom and Alexander Boyko, admitting Mr. Boyko as a member. Pursuant to the amended agreement, Mr. Boyko made a capital contribution to the company in exchange for a 56% interest. Mr. Flom and petitioner had each previously made capital contributions to the company in exchange for their respective interests and, following the issuance of the 56% interest to Mr. Boyko, petitioner's and Mr. Flom's interest in the company was reduced to 22% each.

5. The amended agreement provided that the company would be managed by two managers and that petitioner and Mr. Flom would each appoint one manager. Petitioner appointed himself as a manager. The managers were expressly authorized to act, without the consent of any other member, to perform all acts to further the company's business and had the sole authority to bind the company or exercise any rights or actions for the company. Petitioner was also appointed as secretary and treasurer of the company. Petitioner was authorized to sign checks for the company. The amended agreement provided that all checks, wire transfers or similar instruments of the company must be signed by at least two of the following four people: Mr. Flom, petitioner, Isaac Ashwal (the executive manager) or the company's controller, but if

such check, wire transfer or similar instrument was for $50,000.00 or more, then one of the two signatures must be of petitioner or Mr. Flom.

6. The amended agreement designated petitioner as "Tax Matters Member" of the company and authorized him to act in any manner necessary to resolve tax matters. The amended agreement provided that if petitioner was unable to carry out the duties of acting as Tax Matters Member, then Mr. Flom would serve as Tax Matters Member. The amended agreement further provided that in the event of a disability, that would render a member unable to competently discharge his responsibilities, the member's successor manager would be substituted. The amended agreement defined disability to mean "the inability of a Member to perform his duties as a Manager hereunder due to any physical or mental incapacity for a period of 120 consecutive days or any 150 days in any one year period." The amended agreement further provided that to establish a disability, such physical or mental incapacity must be verified by a physician duly licensed in the State of New York and must be reasonably selected by the company.

7. The company filed a 2016 form 1065, U.S. return of partnership income, dated September 15, 2017, that listed petitioner as "Tax Matters Partner."

8. The company's 2016 schedule K-1, partner's share of income, deductions, credits, etc., lists petitioner as a general partner with a 22% interest.

9. The Division of Taxation (Division) determined that the company owed sales tax for the period at issue.

10. On December 18, 2018, the Division issued to petitioner, as a responsible person of the company, the following notices of determination (notices) at issue here: assessment identification number L-049284369, asserting additional tax due of $163,632.57, plus interest

and penalty, for the period December 1, 2016 through February 28, 2017; assessment identification number L-049284368, asserting additional tax due of $9,035.16, plus interest and penalty, for the period March 1, 2017 through May 31, 2017; assessment identification number L-049284367, asserting penalty of $350.00, for the period June 1, 2017 through August 31, 2017; and assessment identification number L-049284366, asserting penalty of $300.00, for the period September 1, 2017 through November 30, 2017.

11. Petitioner timely filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices, in addition to other notices not at issue herein. By conciliation order (CMS number 000308530), the conciliation conferee sustained the statutory notices at issue here.[1] Petitioner, thereafter, filed timely petitions with the Division of Tax Appeals.

12. Petitioner does not dispute the underlying determination of sales tax due from the company and asserts only that his liability should be reduced to 22% and that penalties should be abated.

## *CONCLUSIONS OF LAW*

A. Tax Law former § 1133 (a) provided, in part, that:

> "every person required to collect any tax imposed by this [article 28] shall be personally liable for the tax imposed, collected or required to be collected under [article 28]. . . ." (Tax Law former § 1133 [a], effective May 29, 2002 through April 11, 2018).

Tax Law § 1131 (1), in turn, defines "[p]ersons required to collect tax" and a "person required to collect any tax imposed by [article 28]" to include, among others:

> "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,

[1] There is a typographical error in the conciliation order, listing notice number L-049284366 as L-0492843666.

> 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 [article 28], or has so acted; *and any member of a partnership or limited liability company*" (emphasis added).

During the period at issue, up until April 12, 2018, the Tax Law contained no factors to qualify or limit the liability imposed upon members of partnerships or limited liability companies and imposed per se liability upon such members (***see Matter of Santo***, Tax Appeals Tribunal, December 23, 2009 ["Petitioner was a member of a limited liability company and, as with members of a partnership, such members are subject to per se liability for the taxes due from the limited liability company. . . . Since Tax Law § 1131 (1) imposes strict liability upon members of a partnership or limited liability company, all that is required to be shown by the Division for liability to obtain is the person's status as a member."]; ***see also Matter of Carlson***, Tax Appeals Tribunal, April 29, 2021 ["The Tax Appeals Tribunal has consistently interpreted the foregoing language as imposing strict liability upon members of a limited liability company for sales tax liabilities."]; ***Matter of Boissiere and Krystal***, Tax Appeals Tribunal, July 28, 2015; ***Matter of Bartolomei***, Tax Appeals Tribunal, April 3, 1997). There is no dispute that petitioner was a member of the company and held a 22% interest therein. Thus, for the period at issue, as a member of the company, petitioner is strictly liable for its tax liabilities (***see*** Tax Law former § 1133 [a]; ***Matter of Santo***).

B. Petitioner's argument that his liability should be reduced to 22% is without merit. Specifically, petitioner cites to Tax Law § 1133 (a) (2) to support his argument that his liability should be reduced to reflect his ownership interest in the company.[2] However, petitioner fails to

[2] Specifically, Tax Law § 1133 (a) was amended, effective April 12, 2018, to add subdivision 2, which provided, in part, that where a member of a limited liability company demonstrated to the satisfaction of the commissioner that such member's ownership interest and percentage of the distributive share of profits and losses of such limited liability company was less than fifty percent and "such limited partner or member was not under a duty to act for such limited partnership or limited liability company in complying with any requirement of this article" and where such member submitted an application meeting specific requirements for relief to the commissioner, that

disclose that subsection (2) of Tax Law § 1133 (a) was not in effect for the period at issue and petitioner presents no argument that such law should be applied retroactively. Instead, petitioner disingenuously argues as if that subsection was controlling for the period at issue. Even after the Division noted in its brief that the section petitioner relied upon was not in effect during the period at issue, petitioner doubled down on his argument that he should be granted relief under such provision and contends that he applied for such relief pursuant to Tax Law § 1133 (a) (2) (ii). Petitioner's argument has no merit because the qualified relief provided by Tax Law § 1133 (a) (2) was not in effect until April 12, 2018, which falls after the period at issue. Petitioner presented no argument for retroactive application, and any such retroactive application is unwarranted here, as the plain language of the statute does not call for such retroactive application (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 51).

C. Petitioner further argues that penalties should be abated. Tax Law § 1145 (a) (1) (i) provides for penalties for the failure to file a return or pay tax due within the time required by the Tax Law. For the abatement of penalties, petitioner bears the burden to establish that the failure to pay tax or timely file a return "was due to reasonable cause and not due to willful neglect" (Tax Law § 1145 [a] [1] [iii]; ***see Matter of MCI Telecom. Corp.***, Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 193 AD2d 978 [3d Dept 1993]). In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (***see Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained that "[b]y first requiring the

---

such member would be liable for the percentage of the original sales and use tax liability of their respective limited liability company that reflected such member's ownership interest or distributive share of the profits and losses of such limited liability company, whichever was higher (***see*** Tax Law former § 1133 [a] [2], eff. Apr. 12, 2018, L 2018, ch 59). The qualified relief provision for minority limited liability company members under Tax Law former § 1133 (a) (2) was not in effect until after the period at issue and was subsequently repealed on May 9, 2025. As such, it is inapplicable to this matter. It is further noted that even if the minority member relief provision of Tax Law former § 1133 (a) (2) applied for the period at issue, which it does not, petitioner would not qualify for such relief because as the "tax matters member" of the company, authorized to act in any manner necessary to resolve tax matters, he was under a duty to act for such company in complying with any requirement of the Tax Law.

imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation" (***Matter of MCI Telecom. Corp.***).

Petitioner argues that penalties should be abated due to a medical condition. Petitioner provided a letter from Dr. Fernando Segovia, dated May 9, 2019, that states that Mr. Nilva has been under his care since 2003 and that in the last three months he has had two major surgeries with resulting complications. Petitioner also provided a letter from Cross County Cardiology, signed by Brian Bechtold, PA, PA-C, on February 26, 2020, stating that Mr. Nilva has been unable to work since 2016. However, in contrast to Mr. Bechtold's assertion that petitioner was unable to work, the company's 2016 form 1065 and 2016 schedule K-1 show that petitioner continued in his position as a member and Tax Matters Member of the company during the period at issue. The letter from Mr. Bechtold further lists multiple medical procedures petitioner has undergone but does not list the dates for such procedures and does not list his specific limitations for the period at issue. Neither letter specifies whether petitioner was unable to discharge his duties for the company as set forth in the company's amended agreement during the period at issue. Further, petitioner provided no evidence that he withdrew as the Tax Matters Member and manager of the company due to his condition nor that he was replaced for being unable to carry out his duties. There is no evidence in the record that petitioner met the definition of a disability in accordance with the company's amended agreement by verifying, through a physician selected by the company, an "inability . . . to perform his duties . . . for a period of 120 consecutive days or any 150 days in any one year period" for the period at issue. Indeed, as noted above, petitioner continued to be designated as Tax Matters Partner during the period at issue, as reflected on the company's 2016 form 1065, dated September 15, 2017.

Petitioner merely disregarded his duties and, thus, has failed to establish reasonable cause and the lack of willful neglect.

D. The petition of Veniamin Nilva is denied, and the notices of determination, dated December 18, 2018, as modified by the conciliation order, are sustained.

DATED: Albany, New York
June 11, 2026

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE