STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN P. BARTOLOMEI, OFFICER OF WINTERGAR DEN INN ASSOCIATES	:	DECISION DTA No. 812888
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, 1991 through August 31, 1991.	:	

Petitioner John P. Bartolomei, Officer of Wintergarden Inn Associates, 335 Buffalo Avenue, Niagara Falls, New York 14303, filed an exception to the determination of the Administrative Law Judge issued on February 15, 1996. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James Della Porta, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Jenkins and Pinto concur.

ISSUE

Whether petitioner is a person required to collect sales tax on behalf of Wintergarden Inn Associates pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On June 1, 1993, the Division of Taxation ("Division") issued to petitioner, John P. Bartolomei, a Notice of Estimated Determination which assessed $65,477.18 in additional sales and use tax due, plus penalty and interest, for the period June 1, 1991 through August 31, 1991. The notice further advised petitioner that he was being assessed as an "Officer/ Responsible Person" of Wintergarden Inn Associates.

The assessment against petitioner was subsequently reduced to $30,604.07, plus penalty and interest, pursuant to a Conciliation Order dated March 11, 1994. Said reduced amount represents the amount reported,but not paid, by Wintergarden Inn Associates on its sales tax returns filed with respect to the period at issue herein.

Wintergarden Inn Associates ("Wintergarden") was a limited partnership that did business as and operated a hotel known as the Inn at the Falls located in Niagara Falls, New York. At the time in question, National Urban Ventures, Inc. was general partner in Wintergarden. The general partner held a 50% ownership interest in the partnership. The remaining 50% ownership interest in Wintergarden was held by four limited partners, one of whom was petitioner. Petitioner became a limited partner pursuant to the "Second Amendment to the Limited Partnership Agreement", dated April 9, 1986. Petitioner owned 30% of the limited partnership share, equivalent to a 15% ownership interest in Wintergarden. The largest limited partnership share, which amounted to 42%, was held by one Edward U. Bevilacqua.

Additionally, as of April 1986 petitioner was a 30% shareholder in National Urban Ventures, Inc., the general partner of Wintergarden. Prior to that time, Edward U. Bevilacqua was the sole shareholder of National Urban Ventures, Inc. and its predecessors. As of April 1986, Mr. Bevilacqua's stock interest in the corporate general partner declined to 67%.

The Inn at the Falls maintained payroll, operating, and money market bank accounts. Petitioner was an authorized signatory on each. Copies of the bank corporate signature cards for each account, dated June 21, 1989, August 30, 1989, and March 12, 1990, respectively, were

submitted into evidence herein. Petitioner is listed as the president of the Inn at the Falls on each card.

Petitioner was also vice-president of National Urban Ventures, Inc. As vice-president, petitioner executed a Certificate of Assumed Name, dated August 1, 1987, on behalf of National Urban Ventures, Inc. Petitioner also executed a State Liquor Authority Application for Caterer's Permit, dated September 6, 1988, on behalf of Wintergarden as vice-president of National Urban Ventures, Inc.

The Limited Partnership Agreement under which Wintergarden operated vested the general partner with exclusive authority to manage and control the business affairs of the partnership. The Limited Partnership Agreement explicitly excluded limited partners from participation in the management and control of the partnership's business, from transacting any business on behalf of the partnership, and from acting for or binding the partnership.

Petitioner is an attorney. At the time petitioner became a limited partner in Wintergarden he practiced law with one John J. Del Monte, Esq., under the firm name Bartolomei & Del Monte, P.C. Mr. Del Monte was also a limited partner in Wintergarden and a shareholder in National Urban Ventures, Inc., although his ownership interest in the hotel operation was much smaller than that of petitioner. Bartolomei & Del Monte, P.C. contributed $425,000.00 to the partnership.

Petitioner was previously assessed by a notice of determination as a responsible officer of Wintergarden with respect to a claimed sales and use tax liability for the period December 1, 1987 through August 31, 1990. Following a conciliation conference, this assessment was cancelled pursuant to a Consent dated May 12, 1992. There is no evidence in the record regarding the basis for this cancellation.

In October 1991, Wintergarden went into receivership. The receiver was appointed by an Order of the State Supreme Court pursuant to an action filed by the trustee of certain creditors of the enterprise. Among others, Wintergarden, National Urban Ventures, Inc. and Edward U. Bevilacqua were specifically named as defendants in said action. Petitioner was not named as a

defendant in the proceeding. The trustee made a payment of $36,900.00 to the Commissioner of Taxation by check dated March 3, 1994. The record herein contains a copy of a transmittal letter dated March 16, 1994 from the trustee's attorney to the Division of Taxation indicating that the check was enclosed therein. The letter further refers to a bankruptcy proceeding involving Wintergarden and notes that the $36,900.00 was being forwarded in full satisfaction of the Commissioner's claims against Wintergarden's bankrupt estate. The record contains no other information regarding the taxes which were purportedly the subject of the Commissioner's claim against Wintergarden's bankrupt estate, such as the specific tax or taxes and periods involved. Indeed, other than the comments made in the transmittal letter dated March 16, 1994 from the trustee's attorney, the record contains no information regarding the Wintergarden bankruptcy case.

Wintergarden's sales tax liability for the month of March 1991 was paid by a check dated April 22, 1991 in the amount of $4,802.91 drawn on the escrow account of Bartolomei & Grenga, P.C. The check does not bear petitioner's signature.

OPINION

In his exception, petitioner argues that there was no proof that Wintergarden operated a hotel known as "Inn at the Falls"; that the bank signature cards, Certificate of Assumed Name and application for a caterer's permit submitted were not relevant proof of his active participation in the business of Wintergarden; that the documentary evidence showed that petitioner was not involved in the operation of the hotel; and that there was no evidence to show that petitioner was the president of Wintergarden. Additionally, petitioner argues that the order of a conciliation conferee canceling the liability of petitioner for sales tax for a prior period was dispositive of his liability for the period now in issue and that any tax liability of Wintergarden had been paid in full. Petitioner also argues that the Administrative Law Judge issued his determination in an untimely manner, thus, invalidating the determination.

The Division, in opposition, argues that the Administrative Law Judge correctly decided that petitioner was a person who was required to collect tax on behalf of Wintergarden on

several different bases. First, he was a person required to act on behalf of the corporate general partner of Wintergarden in complying with Article 28 of the Tax Law in regard to Wintergarden. Second, he was a limited partner of Wintergarden. Third, he participated in the management of Wintergarden sufficiently to remove any protection he may have had as a limited partner. Further, the Division argues that Wintergarden and "Inn at the Falls" were the same entity; that the Administrative Law Judge issued his determination in a timely manner; that the cancellation of petitioner's liability by the order of a conciliation conferee for a prior period had no effect on his liability for the period now at issue; and that petitioner's liability had not been satisfied by payment received pursuant to the plan of reorganization of Wintergarden.

In reply, petitioner reiterates the arguments contained in his exception and additionally argues that his petition was, in fact, an affidavit and should have been considered as evidence in support of his claim; that there was no evidence that petitioner was involved in the active management of Wintergarden or "Inn at the Falls"; and that there was no evidence that petitioner was an authorized signatory on Wintergarden accounts.

Tax Law § 1131(former[1]) defined "persons required to collect tax" as including:

> "any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article; and any member of a partnership."

Tax Law § 1133(a) imposes personal liability for sales and use tax imposed, collected or required to be collected under Article 28 of the Tax Law upon such "persons."

In his determination, the Administrative Law Judge concluded that petitioner was a person required to collect sales tax on behalf of Wintergarden for several reasons.

First, he failed to rebut the presumption of correctness accorded to the Notice of Determination at issue and, thus, failed to meet his burden of proof to show that he was not under a duty to act for National Urban Ventures, Inc., the general partner which held a 50% ownership interest in Wintergarden. Petitioner was the vice-president and 30% shareholder of National Urban Ventures, Inc. As vice-president of National Urban Ventures, Inc., petitioner

signed a State Liquor Authority document and a Certificate of Assumed Name. Additionally, the Administrative Law Judge concluded that petitioner was the president of Wintergarden, was an authorized signatory on that partnership's bank accounts and had invested significantly in Wintergarden. The Administrative Law Judge stated:

> "[w]hile these facts do not constitute overwhelming evidence of responsible officer status, petitioner's case consists, for the most part, of conclusory allegations set forth in his petition as to his lack of knowledge and control over the affairs of Wintergarden. . . . Clearly, petitioner's unsupported allegations are outweighed by the evidence in the record, outlined above, indicating that petitioner was a responsible officer of National Urban Associates, Inc. and is therefore liable for the tax assessed herein" (Determination, conclusion of law "E").

Additionally, although petitioner was a limited partner of Wintergarden, the Administrative Law Judge concluded that:

> "where a person is both a limited partner and an officer, director and/or shareholder of a corporate general partner then that person must prove that any relevant actions taken were performed solely in the capacity of officer, director and/or shareholder of the general partner (see, Gonzalez v. Chalpin, 77 NY2d 74, 77, 564 NYS2d 702, 703). In this case, while the partnership agreement names petitioner as a limited partner and specifically excludes limited partners from the management and control of the business, this evidence is outweighed by evidence showing that petitioner was actively involved in the management of Wintergarden. Such active involvement has been outlined above in Conclusion of Law "D." Most significantly, petitioner was president of Wintergarden. There is no evidence that petitioner acted as president of Wintergarden in his capacity as an officer and shareholder of National Urban Ventures, Inc. Petitioner was therefore generally liable for obligations of the partnership (id.), and the Division's assertion of personal liability against petitioner pursuant to Tax Law § 1131(1) for the sales tax obligations of Wintergarden was therefore proper" (Determination, conclusion of law "G").

Further, the Administrative Law Judge noted that section 1131(1) of the Tax Law imposes per se liability on "any member of a partnership" regardless of the partner's involvement in the operation and management of the business without making any distinction between general and limited partners. The Administrative Law Judge concluded that a limited partner such as petitioner is included within the meaning of "any member of a partnership" as used in Tax Law § 1131(1) (Determination, conclusion of law "H"). We agree with these conclusions of the Administrative Law Judge.

Petitioner argues, on exception, that there was no evidence on which the Administrative Law Judge could properly conclude that petitioner was the president of Wintergarden. We disagree. Among its exhibits, the Division submitted copies of bank signature cards executed by petitioner on which he identified himself as the "President" of "Inn at the Falls." According to the information furnished to the Division by Wintergarden on its sales and use tax returns, Wintergarden was doing business as "Inn at the Falls." Further, the tax identification numbers on the bank signature cards and Wintergarden's tax returns were identical. While these signature cards present rebuttable evidence of petitioner's status as president of Wintergarden, petitioner did not offer any evidence to contradict or refute this conclusion. As the Administrative Law Judge correctly noted, a presumption of correctness attaches to a notice of determination upon its issuance and the burden of proof to overcome a sales tax assessment rests with the taxpayer. Petitioner did not meet his burden in this regard. In fact, the Division was the only party which submitted evidence into the record. Petitioner submitted neither a brief in support of his position nor one in reply to that submitted by the Division.

Contrary to the assertions of petitioner, there is no support for his allegations that his name appeared on the signature cards only as an attorney for the partnership and only for an emergency situation. Therefore, the Administrative Law Judge could reasonably conclude that petitioner was the president of Wintergarden based on the evidence submitted and could reasonably conclude as a matter of law that petitioner was a person required to collect tax on behalf of Wintergarden.

As to the timeliness of the Administrative Law Judge's determination, section 3000.15(e) of the Tribunal's Rules of Practice and Procedure (20 NYCRR 3000.00 et seq.) provides, in applicable part: "[t]he administrative law judge will render a determination within six months after completion of the hearing or the submission of briefs, whichever is later." In his determination, the Administrative Law Judge stated:

> "[p]ursuant to a schedule set by the Administrative Law Judge, petitioner had until July 21, 1995 to submit documentary evidence and/or a brief, but did not do so. The Division of Taxation submitted its brief on August 22, 1995. Petitioner had until September 8, 1995 to submit a reply brief, but

> did not do so. Accordingly, the six-month period for the issuance of this determination began on September 8, 1995" (Determination, p. 1).

The determination of the Administrative Law Judge was issued on February 15, 1996. When the Administrative Law Judge allows the parties time within which to submit post-hearing briefs, we do not interpret our rules as requiring the Administrative Law Judge to calculate the due date for his determination from the hearing date if the anticipated briefs are not, in fact, submitted. Therefore, the determination was timely issued within the period allowed by 20 NYCRR 3000.15(e).

Petitioner argues that his petition should have been considered as an affidavit and given evidentiary weight by the Administrative Law Judge. We disagree. An affidavit "include[s] every mode authorized by law of attesting the truth of that which is stated" (General Construction Law § 36). An affidavit is sworn to "before any officer authorized by law to take the acknowledgment of deeds in this state, unless a particular officer is specified" (General Construction Law § 12). Pursuant to section 105(u) of the Civil Practice Law and Rules (CPLR) a verified pleading may be utilized as an affidavit whenever the latter is required. A "verification" is a statement under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, and those matters are believed to be true (CPLR 3020[a]).

Pursuant to section 3000.15(d)(1) of the Tribunal's Rules of Practice and Procedure (20 NYCRR 3000.00 et seq.), all witnesses testifying at a hearing before an Administrative Law Judge shall testify under oath or by affirmation. Affidavits as to relevant facts may be received in evidence in lieu of the oral testimony of the persons making such affidavits (20 NYCRR 3000.15[d][1]). The petition submitted by petitioner contains the following statement at its conclusion: "WHEREFORE, the petitioner respectfully requests that this petition be granted. The statements in this petition are made with the knowledge that a willfully false representation is a misdemeanor punishable under section 210.45 of the Penal Law." This is clearly not a statement made under oath attesting to the truth of its contents nor was the petition sworn to before an officer authorized to acknowledge deeds. As such, it does not qualify as either an

affidavit or a verified pleading and the Administrative Law Judge properly considered petitioner's statements therein as "conclusory allegations" and not as evidence (Determination, conclusion of law "D"). Pursuant to CPLR Rule 2106, the statement of an attorney admitted to practice in New York and not a party to the action, when subscribed and affirmed to be true under the penalties of perjury, may serve in place of an affidavit. The petition is not such an affirmation. Although made by an attorney, it is not affirmed to be true under the penalties of perjury. Further, since the attorney making the petition is also the party to the proceeding, the privilege of affirming is inapplicable (Fitzgerald v. Willes, 83 Misc 2d 853, 373 NYS2d 773).

The remaining issues raised by petitioner were presented to and considered by the Administrative Law Judge. After reviewing all the evidence presented in this case, we find that the Administrative Law Judge correctly and adequately addressed these issues and we find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John P. Bartolomei, Officer of Wintergarden Inn Associates is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of John P. Bartolomei, Officer of Wintergarden Inn Associates is denied; and

4. The Notice of Estimated Determination, dated June 1, 1993, as modified by the Conciliation Order, dated March 11, 1994, is sustained.

DATED: Troy, New York
April 3, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner