

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
GRACIELA CARLOS :
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 September 1, 2000 through August 31, 2001. :

DECISION
DTA NOs. 820201
AND 820229

In the Matter of the Petition :
of :
ARMANDO CARLOS :
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 September 1, 2000 through August 31, 2001. :

Petitioners, Armando Carlos and Graciela Carlos, each filed an exception to the determination of the Administrative Law Judge issued on July 19, 2007. Petitioners appeared by Carlos H. Bueno, Enrolled Agent. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioners each filed a letter brief with their exception. The Division of Taxation filed a letter brief in opposition and petitioners each filed a letter brief in reply. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether each of the petitioners was a person required to collect tax under Tax Law § 1131(1) so that they are personally and individually liable for sales tax determined due from a bar and restaurant in Corona, Queens.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "3" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The Division of Taxation ("Division") issued a Notice of Determination dated September 8, 2003 against petitioner Graciela Carlos, as an officer or responsible person of Restaurant Egma II Corp., asserting sales and use tax due of \$45,772.79, plus penalty and interest, for the period September 1, 2000 through August 31, 2001. The Division issued a similar Notice of Determination dated September 8, 2003 against petitioner Armando Carlos, as an officer or responsible person of Restaurant Egma II Corp., asserting sales and use tax due of \$45,772.79, plus penalty and interest, for this same period. Tax, interest and penalty were allocated over this one-year period at issue as follows:

| Sales tax quarter ending | Tax amount | Interest | Penalty |
|--------------------------|-------------|-------------|-------------|
| 11/30/2000 | \$11,443.19 | \$ 4,731.02 | \$ 4,577.28 |
| 02/28/2001 | 11,443.19 | 4,259.53 | 4,577.28 |
| 05/31/2001 | 11,443.19 | 3,791.76 | 4,577.28 |
| 08/31/2001 | 11,443.22 | 3,337.94 | 4,577.29 |
| Totals | \$45,772.79 | \$16,120.25 | \$18,309.13 |

Restaurant Egma II Corp. ("the corporation") owned and operated a restaurant and bar in Corona, Queens known as Plaza Garibaldi 2, located at 102-14 Roosevelt Avenue. Included in the audit papers is a photocopy of a menu for Plaza Garibaldi 2. This menu is also for another restaurant and bar listed as Plaza Garibaldi 1 in Jackson Heights, Queens at 89-12 Roosevelt Avenue, as well as for a bar at 102-16 Roosevelt Avenue known as Garibaldi Bar, apparently located next door to Plaza Garibaldi 2. The menu features Mexican cuisine with items ranging from main dishes such as "Asada Oaxaquena," or shell steak topped with melted cheese and mushrooms served with rice and beans, at \$13.50 to tacos at \$2.00.

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

The Division conducted a sales tax audit of Restaurant Egma II Corp. for the three-year period September 1, 1998 through August 31, 2001, which resulted in an increase to the corporation's taxable sales from reported taxable sales of \$266,500.00 to taxable sales after audit of \$1,930,974.00 for the three-year audit period. The audit was commenced by sending the corporation a request for books and records needed for audit. Records requested, but not made available, included cash register tapes, guest checks, bank statements, cash receipts and disbursements and purchase invoices. The field audit report provided the following succinct description of the sales tax audit:

Vendor had inadequate sales and purchase records for the audit period . . . had no cash register tapes, guest checks, cash receipts and disbursements, or any other source documents available.

In order to arrive at vendor's taxable sales for the audit period, third party information was used. Third party information was received for 1998 for liquor and beer suppliers Third party letters were sent to various suppliers and using information received from these suppliers and information received for 1998, vendor's total liquor and beer purchases amounted to \$558,731 for the audit period.

Based on survey of vendor's premises, and conference held with vendor and his accountant, vendor's food purchases were estimated to be 50% of liquor and beer purchases and amounted to \$279,366 for the audit period. The total liquor and food purchase amounted to \$838,097 for the audit

period. Vendor was then allowed an adjustment of 5% for pilferage and 5% for increase in ending inventory resulting in the total purchases subject to a mark up of \$754,287. A mark up of 156% obtained from NYC Restaurant Resource Guide for 2000, was then applied against total audited purchases of \$754,287 resulting in the total taxable sales of \$1,930,974 for the audit period. After giving vendor credit for taxable sales reported of \$266,510, the additional taxable sales amounted to \$1,664,464 resulting in the additional sales tax due of \$137,318.31 for the audit period.¹

The Division computed interest and penalty on the additional sales tax determined due of \$137,318.31 for the three-year audit period on a Statement of Proposed Audit Changes dated August 25, 2003 issued to Restaurant Egma II Corp. as follows:

| Sales tax quarter ending | Tax amount | Interest | Penalty |
|--------------------------|--------------|-------------|-------------|
| 11/30/1998 | \$ 11,443.19 | \$8,897.86 | \$4,577.28 |
| 02/28/1999 | 11,443.19 | 8,304.90 | 4,577.28 |
| 05/31/1999 | 11,443.19 | 7,716.63 | 4,577.28 |
| 08/31/1999 | 11,443.19 | 7,145.88 | 4,577.28 |
| 11/30/1999 | 11,443.19 | 6,598.06 | 4,577.28 |
| 02/29/2000 | 11,443.19 | 6,072.14 | 4,577.28 |
| 05/31/2000 | 11,443.19 | 5,550.38 | 4,577.28 |
| 08/31/2000 | 11,443.19 | 5,044.16 | 4,577.28 |
| 11/30/2000 | 11,443.19 | 4,558.28 | 4,577.28 |
| 02/28/2001 | 11,443.19 | 4,091.82 | 4,577.28 |
| 05/31/2001 | 11,443.19 | 3,629.05 | 4,577.28 |
| 08/31/2001 | 11,443.22 | 3,180.07 | 4,577.29 |
| Totals | \$137,318.31 | \$70,789.23 | \$54,927.37 |

¹We have modified finding of fact "3" to clarify those records that were requested but not provided to the auditor.

As noted in Finding of Fact “1,” the Division has sought to collect sales tax due, plus interest and penalty, from each of the petitioners individually only for the last four sales tax quarters noted above, covering the period September 1, 2000 through August 31, 2001.

At the hearing, during the testimony of Joseph Moore, the supervising auditor, the Division introduced its audit file, which includes substantial evidence to show the involvement of petitioners in the operation of Restaurant Egma II Corp. With reference to Graciela Carlos, the following evidence showed her involvement in Restaurant Egma II Corp., which operated the restaurant that had failed to properly report and pay sales tax:

(i) The corporation’s power of attorney dated January 8, 2003 was executed by Graciela Carlos in the capacity of president of the corporation;

(ii) The corporation’s power of attorney dated October 15, 2001 was executed by Graciela Carlos although her corporate title was not specified;

(iii) The corporation’s consent dated October 14, 2002 extending the period of limitations for assessment was executed by Graciela Carlos in the capacity of president of the corporation;

(iv) The corporation’s U.S. Corporation Short-Form Income Tax Return for 1999 shows Graciela Carlos with a 100% ownership interest² in the corporation and lists her and Alejandro Carlos as co-presidents of the corporation;

(v) The corporation’s sales and use tax returns for the period September 1, 1998 through November 30, 1998 and the period September 1, 2000 through November 30, 2000 were signed by Graciela Carlos in the capacity of president of the corporation;

²This return also showed Alejandro Carlos with a 100% ownership interest in the corporation.

(vi) The corporate check in payment of sales tax reported due for the period September 1, 1998 through November 30, 1998 in the amount of \$2,258.00 was signed by Graciela Carlos.

With reference to Armando Carlos, the following evidence showed his involvement in Restaurant Egma II Corp.:

(i) The corporation's U.S. Income Tax Return for an S Corporation for 2000 includes a Schedule K-1 showing Armando Carlos as a shareholder with 50% ownership of the corporation's stock;³

(ii) The corporation's sales and use tax returns for the following periods were signed by Armando Carlos in the capacity of president of the corporation: December 1, 2000 through February 28, 2001; March 1, 2001 through May 31, 2001; and June 1, 2001 through August 31, 2001;

(iii) The corporation's New York S Corporation Franchise Tax Return for 2001 shows Armando Carlos as the owner of 50% of the corporation's stock;⁴

(iv) The certificate of incorporation of Restaurant Egma II Corp. dated April 13, 1992 was signed and subscribed by Armando Carlos as incorporator in his capacity of president of the corporation.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

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

[E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include 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

³Arturo Carlos is shown as owning the other 50% of corporate stock.

⁴The other 50% was shown as owned by Arturo Carlos.

such corporation, partnership. . . or individual proprietorship in complying with any requirement of this article; and any member of a partnership.

The Tax Appeals Tribunal has held that:

"[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" (*Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994, *citing Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

With regard to petitioner Graciela Carlos, the Administrative Law Judge found that the documents in evidence established a reasonable basis to conclude that she was a person required to collect sales tax on behalf of the business, since: (1) she signed tax returns for the corporation; (2) wrote a check on behalf of the corporation; (3) executed various documents on behalf of the corporation as its president; and (4) had a 100% ownership interest. The Administrative Law Judge found that with regard to Armando Carlos, documents in evidence also established a reasonable basis to conclude that he was a person required to collect sales tax on behalf of the business, since: (1) he signed tax returns for the corporation; (2) had a 50% ownership interest; and (3) was an incorporator of the corporation in the capacity of president.

The Administrative Law Judge noted that, to some extent, the evidence in the record is in conflict, e.g., if Graciela Carlos has a 100% ownership interest, how can petitioner Armando Carlos have a 50% ownership interest. However, it was petitioners' burden to prove that they were not persons under a duty to act for the corporation. The Administrative Law Judge found that petitioners failed to carry their burden of proof. Neither petitioners nor any witness having

personal knowledge of the business testified at the hearing. Accordingly, petitioners must suffer the consequences of their failure of proof (*cf. Matter of Meixsell v. Commissioner of Taxation*, 240 AD2d 860 [1997], *lv denied* 91 NY2d 811 [1998]).

Since petitioners showed no evidence that the restaurant's failure to pay sales tax was due to reasonable cause and not due to willful neglect, penalties were sustained by the Administrative Law Judge

ARGUMENTS ON EXCEPTION

Petitioners, on exception, do not contest the amount of tax asserted due for the period at issue. Armando Carlos claims he was never an employee of petitioner having a duty to collect tax on behalf of the corporation. Mr. Carlos argues that any document he signed as an owner or officer was an error.

On exception, Ms. Carlos argues that she has never been an employee of the corporation having a duty to collect and remit sales tax on behalf of the business. She denies any ownership interest in the business and states that any document or return she signed "as President" was an error.

The Division counters that petitioner Armando Carlos signed three of the four sales tax returns for the period in issue and was listed on numerous New York State and Federal corporation tax returns as a fifty percent owner of the corporation. In addition, the Division notes that Armando Carlos was also the incorporator of the corporation. With reference to petitioner, Graciela Carlos, the Division points out that she signed one of the four sales tax returns for the period at issue and also signed powers of attorney on behalf of the corporation. The Division also notes that Graciela Carlos signed all documents as president of the corporation.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons stated therein. Upon a thorough and complete review of this record, we find that the Administrative Law Judge has fully and correctly addressed each of the issues presented. Petitioners have offered no evidence below or argument on exception that would justify our modifying the determination in any respect.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Graciela Carlos and Armando Carlos are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Graciela Carlos and Armando Carlos are denied; and
4. The notices of determination dated September 8, 2003 are sustained.

DATED:Troy, New York
May 1, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner