

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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. :

DETERMINATION
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. :

Petitioner Graciela Carlos, 23-19 120th Street #1F, College Point, New York 11356-2519, 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 September 1, 2000 through August 31, 2001.

Petitioner Armando Carlos, 2221 127th Street, College Point, New York 11356-2532, 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 September 1, 2000 through August 31, 2001.

A consolidated hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 26, 2006 at 10:30 A.M., with all briefs to be submitted by February 2, 2007, which date

began the six-month period for the issuance of this determination. Petitioners appeared by Carlos H. Bueno, EA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

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

1. 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

2. 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.

3. 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 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.

4. 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

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.

5. At the hearing, during the testimony of Joseph Moore, the supervising auditor, the Division introduced the Division’s audit file which includes substantial evidence to show the involvement of the 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 which 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 interest¹ 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;

(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;²

(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

¹ This return also showed Alejandro Carlos with a 100% ownership interest in the corporation.

² Arturo Carlos is shown as owning the other 50% of corporate stock.

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;³

(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.

SUMMARY OF THE PARTIES' POSITIONS

6. Petitioners do not contest the amount of tax asserted due for the period at issue. In his petition, Armando Carlos claimed he was an "employee" of petitioner "and never signed any document as [an] officer . . . and never filed any document as [an] owner of the corporation." In her petition, Graciela Carlos claimed she "was an employee acting as a Manager" and that "The only owner of the corporation is Arturo Carlos." Neither petitioner appeared at the hearing to offer testimony, and the only evidence presented on their behalf was a notarized statement dated October 31, 2006 of Arturo Carlos where he stated that he "was the only owner and responsible for the business" of Egma II Restaurant Corp. He added that "Graciela Carlos was the bookkeeper and Armando Carlos was never directly or indirectly part of the business." According to petitioners' representative, Arturo Carlos "wants to settle" this matter.

7. The Division counters that petitioner Armando Carlos "signed three of the four sales tax returns for the period in issue" and "was also listed on numerous New York State and Federal corporation tax returns as a fifty percent owner of the corporation" (Division's brief, p. 8). In addition, the Division notes that Armando Carlos was also the incorporator of the

³ The other 50% was shown as owned by Arturo Carlos.

corporation. With reference to petitioner Graciela Carlos, the Division points out that she “signed one of the four sales tax returns for the period in issue” and “also signed powers of attorney on behalf of the corporation” (Division’s brief, p. 8). The Division emphasizes that Graciela Carlos “signed all documents as president of the corporation” (Division’s brief, p. 8).

CONCLUSIONS OF LAW

A. Tax Law § 1131(1) expansively defines “persons required to collect [sales] tax” as follows:

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

B. The determination of whether an individual is a person under a duty to act for a business operation is based upon a close examination of the particular facts of the case. In ***Matter of Moschetto*** (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990):

The 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.

C. As noted in the findings of fact, with reference to petitioner Graciela Carlos, documents introduced into evidence by the Division established a reasonable basis to conclude that she was a person required to collect sales tax on behalf of the business: (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. With reference to petitioner Armando Carlos, documents introduced into evidence by the Division similarly established a reasonable basis to conclude that he was a person required to collect sales tax on behalf of the business: (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.

D. Although to some extent the evidence in the record is in conflict, for example, if Graciela Carlos has a 100% ownership interest, how can petitioner Armando Carlos have a 50% ownership interest, it was petitioners' burden to bring out facts so as to prove that they were not persons under a duty to act for the corporation (*see, Matter of Orvis*, Tax Appeals Tribunal, January 14, 1993, **annulled in part** 204 AD2d 916, 612NYS2d 503, **modified** 86 NY2d 165, 630 NYS2d 680, **cert denied** 516 US 989, 133 L Ed 2d 426 [wherein the Tribunal noted that the Division of Taxation does not have the burden of proving the propriety of its assessment, but rather the failure of the petitioner in *Orvis* to "establish the specific fact" required the Tribunal to "conclude that petitioner has not sustained its burden"]]). Petitioners failed to bring out such additional facts. Neither petitioners nor any witness with personal knowledge of the operations of Restaurant Egma II Corp. testified at the hearing. The contentions in the petitions that they were merely employees were not established by adequate proof. Even so, the definition of "persons required to collect [sales] tax" extends to "employees" who have a duty to act for the corporation. In sum, petitioners must suffer the consequences of their failure of proof (*cf, Matter of Meixsell v. Commissioner of Taxation*, 240 AD2d 860, 659 NYS2d 325, *lv denied* 91 NY2d 811, 671 NYS2d 714).

E. Furthermore, although Arturo Carlos might be viewed as also responsible for the collection and remittance of the restaurant's sales tax, petitioners' responsibility for the collection and remittance of such tax remains intact since there is clear statutory language creating joint and several liability (*see*, Tax Law § 1133(a); *Matter of Martin v. Commissioner of Taxation*, 162 AD2d 890, 558 NYS2d 239; *Matter of Bailey*, Tax Appeals Tribunal, November 24, 1993).

F. Finally, petitioners offered no proof that the restaurant's failure to pay sales tax, which it had collected in trust on behalf of the State, was due to reasonable cause and not due to willful neglect. Therefore, penalty is sustained (*see, Matter of Disanco Home Center Corp.*, Tax Appeals Tribunal, February 16, 1989).

G. The petitions of Graciela Carlos and Armando Carlos are denied, and the notices of determination dated September 8, 2003 are sustained.

DATED: Troy, New York
July 19, 2007

/s/ Frank W. Barrie

ADMINISTRATIVE LAW JUDGE