

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEE DAVIS	:	DETERMINATION
	:	DTA NO. 822377
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods September 1, 2005 through November 30,	:	
2005 and June 1, 2006 through August 31, 2006.	:	

Petitioner, Lee Davis, 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 periods September 1, 2005 through November 30, 2005 and June 1, 2006 through August 31, 2006.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 5, 2009 at 10:30 A.M., with all briefs to be submitted by August 21, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., of counsel).

ISSUES

I. Whether petitioner is a person required to collect sales and use taxes on behalf of Camino Sur, LLC, pursuant to Tax Law § 1131(1) and, as such, is personally liable for such taxes pursuant to Tax Law § 1133(a).

II. Whether penalties imposed upon petitioner should be abated.

FINDINGS OF FACT

1. On June 25, 2007, the Division of Taxation (Division) issued two notices of determination¹ to Lee Davis (petitioner) as follows:

Period Ended	Tax Assessed	Interest	Penalty	Total Due
11-30-05	\$14,304.09	\$3,460.12	\$4,028.41	\$21,793.02
08-31-06	\$15,282.78	\$1,810.00	\$2,928.52	\$20,021.30

Each of the notices advised petitioner that he was liable as an officer or responsible person of Camino Sur, LLC (the LLC).

2. The LLC was formed in early 2005 to operate a South American restaurant at 336 West 37th Street in New York City.

3. Petitioner invested some money into the LLC and spent a considerable amount of time building most of the leasehold improvements necessary for the operation of the restaurant. However, he was not involved in the actual operation of the restaurant since he was a contractor by trade.

4. The Division reviewed the records of the LLC for the tax years 2005 and 2006 and found that the LLC had filed sales and use tax returns and withholding tax returns which reported tax due; however, the returns were submitted to the Division without payment of the taxes shown to be due on the returns. During the review of the returns of the LLC, the Division collected documentation to determine those individuals responsible for collecting and remitting tax on behalf of the LLC.

¹ A total of nine notices of determination were issued to petitioner who failed to timely protest any of the statutory notices. However, as to the two notices of determination at issue in this proceeding, the Division has conceded that it does not have sufficient evidence to prove that the two notices were mailed on the date listed thereon. Accordingly, the Division has also conceded that petitioner is entitled to an administrative hearing on the substantive issues arising out of these two notices of determination.

The documentation included a lease of the premises at 336 West 37th Street in New York City by the LLC, dated October 6, 2005, which was signed on behalf of the LLC by petitioner and Charles McTiernan.² The Division also reviewed the Agreement of Limited Liability Company of Camino Sur, LLC, which listed petitioner along with Charles McTiernan and Andrew McTiernan as its managing members.

In addition, the Division obtained a copy of an application for a liquor license for the premises which was filed with the State Liquor Authority on April 5, 2005. The application was filed on behalf of Stage West Corp. by petitioner who indicated that, as the president and manager of the business, he would be responsible for the day-to-day operation of the business to be known as the Zona Sur Restaurant.³ Petitioner previously operated a theater in an adjacent portion of the premises and held a liquor license for that portion thereof. Therefore, he indicated that if he had not filed the application on behalf of the LLC, it would not have been able to secure a liquor license on its own.

Finally, the Division also reviewed the LLC's New York State partnership return filed for the tax year ended 2005 on which petitioner was listed as a partner with an ownership percentage of 16%.

5. Approximately one year after the restaurant opened for business, petitioner became aware that the LLC was not paying its tax liabilities and spoke to Charles McTiernan and to another partner, Thomas Truilgo, who indicated that "they were going to deal with it since

² Petitioner had previously executed leases dated July 5, 2001 and November 11, 2002, on behalf of other corporations, for a portion of these premises which he had operated as a theater.

³ The application indicated that Stage West Corp. had an active liquor license for a portion of the premises which was obtained in November 2001.

business was getting better.” Petitioner never attempted to access records or funds of the LLC. Petitioner never received any profits from the restaurant which operated for only two years.

6. Petitioner occasionally would go to the restaurant to perform repairs of the premises, but had nothing to do with the actual operation of the restaurant. He did not hire or fire employees and never signed checks or tax returns on behalf of the LLC.

7. Paragraph 7.1 of the LLC’s Agreement of Limited Liability Company provided that the managing members (Charles McTiernan, Andrew McTiernan and petitioner) had the “full and exclusive right, power and authority to manage all of the affairs and business affairs of the Company and the Restaurant.” In addition, paragraph 7.5 of the LLC’s Agreement of Limited Liability Company provided that each of the managing members was an agent with the power and authority to execute binding instruments on behalf of the LLC.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) provides that “every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected, or required to be collected under this article.”

B. Tax Law § 1131(1) defines “person required to collect any tax imposed by this article” to include:

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, 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 this article; *and any member of a partnership or limited liability company.*” (Emphasis added.)

C. In its brief, the Division asserts that the Tax Law contains no factors to qualify or limit the liability imposed upon members of partnerships or limited liability companies and cites to

Matter of Bartolomei (Tax Appeals Tribunal, April 3, 1997) in which the Tribunal stated that:

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. . . . We agree with these conclusions of the Administrative Law Judge.

D. Clearly, Tax Law § 1131(1) states that any member of a partnership (as addressed in ***Matter of Bartolomei***) or any member of a limited liability company is a “person required to collect any tax imposed by this article” and, as provided in Tax Law § 1131(a), a member of a limited liability company “shall be personally liable for the tax imposed, collected or required to be collected under this article.” Accordingly, it is unnecessary to further inquire into the particulars of petitioner’s involvement in the business of the LLC; by virtue of his status as a member of the LLC, he is personally liable for the taxes imposed upon the LLC.

E. Penalties were imposed upon petitioner for failure to pay the sales taxes due from the LLC when due, i.e., when the returns were filed for the periods at issue in this proceeding. Other than asserting that the taxes (as well as the interest and penalties imposed upon the assessments) should be collected from Charles McTiernan since he was the member of the company who was most actively involved in the operation of the restaurant business, petitioner has provided no evidence upon which such penalties could be abated.

It is well settled that Tax Law § 1133(a) creates joint and several liability for unpaid sales tax (*see Matter of Milne*, Tax Appeals Tribunal, February 17, 2005; ***Matter of Wendel***, Tax Appeals Tribunal, February 3, 2000). As previously noted, petitioner has failed to provide any

evidence of reasonable cause for the failure of the LLC to pay the taxes as reported on its sales tax returns. Accordingly, penalties imposed must be sustained.

F. The petition of Lee Davis is denied and the notices of determination issued on June 25, 2007 are sustained.

DATED: Troy, New York
February 11, 2010

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE