

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
FRONT STREET RESTAURANT CORP. : DECISION
for Revision of a Determination or for Refund of Sales and : DTA NO. 827293
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 2011 through February 28, 2013. :

Petitioner, Front Street Restaurant Corp., filed an exception to the determination of the Administrative Law Judge issued on January 11, 2018. Petitioner appeared by the Shell Law Firm, PLLC (Martin Shell, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Nicholas A. Behuniak, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on June 11, 2018, the date that petitioner's reply brief was due.

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

ISSUE

Whether petitioner is entitled to a refund of sales taxes collected and remitted to New York State with its sales tax returns for the periods in issue.

FINDINGS OF FACT

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

1. Front Street Restaurant (Restaurant) operates at One Front Street in Brooklyn, New York. The restaurant was opened in 2004 by Marcelo Pevida.

2. Frank Ciolli owned and operated a restaurant named Grimaldi's Pizzeria during the periods in issue. Grimaldi's was originally operating at 19 Old Fulton Street in Brooklyn, New York.

3. In 2011, Mr. Ciolli and Mr. Pevida entered into a business relationship that created petitioner, Front Street Restaurant Corp., that was evidenced by three separate, written agreements. The first agreement is dated October 2011 (the day of the month was left blank).¹ Such agreement was between Mr. Ciolli and Mr. Pevida. Each was determined to be a shareholder in the operating agreement. Mr. Ciolli was a 40% shareholder and was named vice president/secretary and director. Mr. Pevida was a 60% shareholder and was named president and director.

4. In the second written agreement, the date noted is October 3, 2011, and it is between three parties: Mr. Ciolli, Mr. Pevida and Mr. Jia Ju Tao. The language in this agreement provided that Mr. Ciolli remained a 40% shareholder, while both Mr. Pevida and Mr. Tao were 30% shareholders. Both Mr. Ciolli and Mr. Pevida retained their titles as set forth in the first agreement. Mr. Tao was named treasurer.

¹ As noted at the hearing (transcript, p. 28), exhibit 1 was missing the second page of the six-page agreement.

5. The third written agreement was entered into by the parties after the period at issue in this matter and, thus, will not be considered in this determination.

6. It was agreed that Grimaldi's would move its pizza operations into the Restaurant's neighboring location. Moreover, the two business entities would continue to remain separate service operations.

7. The first and second written operating agreements provided that:

“[t]he parties agree to cooperate with each other and to utilize the single accountant for the Corporation taxes, with each party contributing to the corporation taxes as necessary based upon the revenues and expenses incurred by each of the two parties in their respective. The accountant will maintain separate balance sheets and accountings for the Grimaldi operation and for the Cabaret operation, and each party shall have full access to all records maintained by the Corporation accountant.”

8. Under these agreements, each business operation was responsible for its portion of the revenue and expenses as well as its portion of the sales tax collected and remitted to New York under the corporation's single tax return for each quarterly tax period.

9. As a corporation, petitioner timely filed its New York State and local quarterly sales and use tax returns (ST-100s) and remitted the tax collected with the returns. Mr. Pevida signed and filed the quarterly return for the initial period of December 1, 2011 through February 29, 2012. Mr. Ciolli signed and filed the remainder of the returns for the period in issue.

10. On or about July 1, 2014, petitioner filed amended sales tax returns using information that it alleges pertained solely to the operation of the Restaurant. Petitioner asserted that the original ST-100s filed by it reflected sales tax due for both business operations in error. Therefore, petitioner claimed a refund to the extent that the corporation paid sales tax revenue in excess of the sales tax liability for the operation of the Restaurant only.

11. By letter dated December 22, 2014, the Division of Taxation (Division) denied petitioner's refund claim in full. The Division stated that petitioner failed to provide any documentation that established any basis for the refund claimed.

12. Petitioner thereafter filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services to contest the refund denial by the Division. By conciliation order dated July 31, 2015, the refund denial letter was sustained. Petitioner then filed a timely petition with the Division of Tax Appeals.

13. At the hearing, petitioner presented the testimony of Mr. Pevida. His testimony discussed the difficult relationship he experienced with Mr. Ciolli. Petitioner did not submit any documentation regarding sales during the periods for which a refund was claimed. Neither Mr. Ciolli nor Mr. Tao appeared at the hearing.

14. The Division submitted 15 proposed findings of fact pursuant to section 3000.15 (d) (6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal to the Administrative Law Judge. All of the proposed findings of fact were accepted and incorporated into the Administrative Law Judge's findings of fact, except for proposed finding of fact 7, which was deemed irrelevant.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by citing the section of the Tax Law that provides for the imposition of sales tax on certain food and beverage transactions. She noted that in this case, it was undisputed that petitioner operated two separate businesses and collected sales tax on its food and beverage sales, which it remitted when it filed its quarterly tax returns.

Next, the Administrative Law Judge considered petitioner's argument that Restaurant paid more than its ratable share of petitioner's tax liability and thus is entitled to a refund. The Administrative Law Judge observed that Tax Law § 1139 provides for a refund or credit of sales tax erroneously, illegally or unconstitutionally collected or paid. However, the Administrative Law Judge found that petitioner chose to form a corporation of the two business operations, Restaurant and Grimaldi's. Petitioner's choice to file its sales tax returns and remit collected sales tax under one vendor identification number did not amount to an illegal or erroneous payment of sales tax so much as an intra-corporate disagreement regarding contributions by petitioner's shareholders to petitioner's sales tax obligations, according to the Administrative Law Judge. The Administrative Law Judge observed that although Mr. Pevida attempted to disavow the corporate agreement, Restaurant was not the taxpayer in this matter. Thus, the Administrative Law Judge deemed petitioner's argument to be without merit.

The Administrative Law Judge concluded that because petitioner properly collected and remitted sales tax to the Division, it was not entitled to a refund and thus denied its petition.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Division's refusal to grant its refund claim amounts to a re-assignment of income to petitioner that should be attributed to Grimaldi's. In short, petitioner argues that nothing short of surrendering control of Grimaldi's to petitioner would be sufficient to affect a valid assignment of income from Grimaldi's to petitioner and thus result in petitioner's liability for Grimaldi's taxable sales. As an alternative argument, petitioner claims that Grimaldi's use of petitioner's certificate of authority was impermissible under the Tax Law, as certificates of authority cannot be transferred or assigned, and thus petitioner cannot be held liable for Grimaldi's sales tax liabilities.

The Division argues that petitioner failed to provide records supporting the sales tax reporting position taken on the amended sales tax returns for the period at issue. The Division also states that petitioner has failed to comply with Tax Law § 1139, which requires that a taxpayer claiming a refund of sales tax show that it had repaid the sales tax to the customer. Finally, the Division argues that providing the refund claimed in this matter would amount to an illegal use of the sales tax trust money to pay business creditors.

OPINION

For the reasons outlined below, we affirm the determination of the Administrative Law Judge.

Tax Law § 1105 provides for the imposition of sales tax on certain categories of food and beverage transactions, including food and beverage sales in restaurants (Tax Law § 1105 [d]). Tax Law § 1139 provides for a refund or credit of any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid. One requirement for a refund or credit of sales tax under that section is that, where sales tax has been collected from its customers, the taxpayer must show that it had repaid such customers the sales tax for which it claims a refund (Tax Law § 1139 [a]; *see also Matter of Stamford Subaru, LLC*, Tax Appeals Tribunal, November 23, 2016; *Matter of Saltzman v New York State Tax Commn.*, 101 AD2d 910 [3d Dept 1984]). There is a presumption that the transactions listed in Tax Law § 1105 (d) are subject to sales tax and thus the taxpayer bears the burden of proof in showing its entitlement to a refund (*see* Tax Law § 1132 [c] [1]).

Our review of the record demonstrates that petitioner was, during the periods here at issue, a singular corporate entity that included three shareholders, including Msrs. Ciolli and Pevida, as relevant to petitioner's refund claim. There is no dispute that petitioner collected and

remitted sales tax on its taxable sales to the Division. However, petitioner made no showing that the sales tax for which it seeks a refund was erroneously or illegally collected or paid or that it had repaid the sales tax it had collected from its customers. Indeed, petitioner offered no documents in support of its refund claim other than its amended sales tax returns. Because petitioner failed to show that it complied with these threshold requirements for a refund of sales tax, we affirm the determination of the Administrative Law Judge and sustain the Division's denial of petitioner's refund claim.

By the petition in this matter, it appears that Mr. Pevida is essentially requesting that the Division of Tax Appeals and this Tribunal resolve an intra-corporate dispute between shareholders as to who is ultimately liable for the sales tax due on petitioner's taxable sales. We are precluded from intervening in such a dispute, as the jurisdiction of this Tribunal concerns resolving controversies between taxpayers and the Division of Taxation (*see* Tax Law § 2000). This is not the proper forum for resolving disputes among taxpayers.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Front Street Restaurant Corp is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Front Street Restaurant Corp. is denied; and
4. The refund denial dated December 22, 2014 is sustained.

DATED: Albany, New York
December 11, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner