

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
JI CHAO ZHENG AND : DETERMINATION
PACIFIC WORLD BUFFET, INC. : DTA NOS. 824509
: AND 824597
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 2009 through February 28, 2010. :
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Petitioners, Ji Chao Zheng and Pacific World Buffet, Inc., filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2009 through February 28, 2010.

A consolidated hearing was held before Winifred M. Maloney, Administrative Law Judge, in New York, New York, on June 5, 2013 at 10:30 A.M., with all briefs to be submitted by December 5, 2013, which date began the six-month period for issuance of this determination. Petitioners appeared by Kent Fok, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Infantino, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals has subject matter jurisdiction over the petition filed by Pacific World Buffet, Inc.

II. Whether Ji Chao Zheng was personally liable for sales tax due on behalf of Pacific World Buffet, Inc., as a person required to collect and pay tax under Tax Law §§ 1131 and 1133.

III. Whether petitioner Ji Chao Zheng has shown reasonable cause for abatement of penalties assessed.

FINDINGS OF FACT

1. Petitioner Pacific World Buffet, Inc. (Pacific World Buffet or the corporation), filed a New York State Department of Taxation and Finance Application to Register for a Sales Tax Certificate of Authority (form DTF-17) on March 12, 2009. The address of the business location was Elmhurst, New York. The date indicated for the start of the business was March 9, 2009, and the reason for the application was the creation of a new business, described as a “full-service restaurant.” Section G of this application contained information for only one responsible person, petitioner Ji Chao Zheng, listed as president of the corporation. Mr. Zheng signed and dated this application as president and as a responsible person of the corporation. Pacific World Buffet operated a restaurant called East Manor at the Elmhurst, New York, location.

2. Pacific World Buffet was required to file part-quarterly (monthly) and quarterly sales and use tax returns. For the month of December 2009, Pacific World Buffet timely filed its part-quarterly return (ST-809) with a check in the amount of \$29,226.26, drawn on its account with TD Bank. This part-quarterly return was not signed. The check was returned unpaid by the bank to the Division of Taxation (Division). For the month of January 2010, Pacific World Buffet timely filed its part-quarterly return, with a check in the amount of \$17,793.67, drawn on its account with the First International Bank. “FINAL RETURN” was stamped at the top of this part-quarterly return, which bears only an illegible signature and the date “02/18/10.”

3. Pacific World Buffet timely filed its final quarterly sales tax return (ST-810) for the period December 1, 2009 through February 28, 2010. On this final quarterly return, Pacific World Buffet reported total sales and use tax due in the amount of \$47,019.93, advance payments

of \$47,019.93, and a vendor collection credit of \$200.00. Although the handwritten date of “3/15/10” appears in the signature section of this final quarterly return, it does not bear either the signature or the printed name and title of the taxpayer.

4. The Division issued a Notice and Demand (Notice number L-034119994), dated June 17, 2010, to Pacific World Buffet, in which it asserted sales tax due in the amount of \$29,226.26, plus penalty and interest, for the period December 1, 2009 through February 28, 2010. In this notice, the Division computed total sales, use and other taxes due in the amount of \$47,019.93 less prepayments or advance payments of \$17,793.67, for a balance of tax due in the amount of \$29,226.26. The notice explained that \$17,793.67 was timely paid for the month of January 2010, but Pacific World Buffet’s remittance of \$29,226.26, in payment of its December 2009 sales and use tax, was returned to the Division unpaid by Pacific World Buffet’s bank. The notice also explained that the penalty was computed at 10% of the tax due for the first month plus 1% of the tax due for each month thereafter, not to exceed 30%.

5. On November 8, 2010, the Division issued to Ji Chao Zheng, a Notice of Determination (Notice number L-034981171) that assessed \$29,226.26 in sales and use taxes due, plus penalty and interest, for the period December 1, 2009 through February 28, 2010. The notice indicated that Mr. Zheng was being held liable as an officer or responsible person of Pacific World Buffet.

6. Mr. Zheng signed the corporation’s part-quarterly sales and use tax returns for the months of July 2009 (dated August 7, 2009), August 2009 (dated September 18, 2009), September 2009 (dated October 14, 2009) and October 2009 (dated November 18, 2009). Mr. Zheng also signed the corporation’s quarterly sales and use tax returns for the periods March 1, 2009 through May 31, 2009 (dated June 18, 2009), June 1, 2009 through August 30, 2009 (dated

September 18, 2009) and September 1, 2009 through November 30, 2009 (undated). Mr. Zheng's title does not appear on any of these part-quarterly and quarterly returns.

7. On July 20, 2009, Mr. Zheng, as president of Pacific World Buffet, signed the corporation's Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return (form NYS-45) for the period January 1, 2009 through March 31, 2009. Mr. Zheng also signed the corporation's Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for the period April 1, 2009 through June 30, 2009 (undated) that was filed on October 26, 2009.

8. Mr. Zheng, as the authorized person, signed Pacific World Buffet's 2008 General Business Corporation Franchise Tax Return Short Form (Form CT-4) for the tax period June 4, 2008 through May 31, 2009, and the corporation's 2008 General Business Corporation MTA Surcharge Return (Form CT-3M/4M) for the tax period June 4, 2008 through May 31, 2009. The Division received these returns on July 29, 2009. Review of the corporation franchise tax return indicates that Pacific World Buffet was incorporated in New York State on June 4, 2008, and its principal business activity was restaurant.

9. As noted in Finding of Fact 2, the corporation filed its final part-quarterly sales and use tax return for the month of January 2010 on or about February 22, 2010. The record is silent as to the exact date on which Pacific World Buffet ceased operating at the Elmhurst, New York, location.

10. Sometime after the Notice and Demand was issued to Pacific World Buffet, the Division assigned Allen Mirochink, a tax compliance agent in the Division's Collections and Civil Enforcement Division, to collect the delinquent sales tax for the period December 1, 2009 through February 28, 2010 from the corporation. On an unspecified date, Mr. Mirochink made a

field visit to the Elmhurst, New York, location, and confirmed that Pacific World Buffet was closed. Mr. Mirochink attempted to contact Mr. Zheng unsuccessfully by telephone regarding Pacific World Buffet's outstanding sales tax liability for the period December 1, 2009 through February 28, 2010. No active bank accounts for Pacific World Buffet were found by Mr. Mirochink because the business was already closed.

11. After reviewing documents in the Division's computer system, Mr. Mirochink determined that Mr. Zheng was a person responsible for collecting and paying over the sales taxes of Pacific World Buffet. In making his determination, Mr. Mirochink used the following documents: the Application to Register for a Sales Tax Certificate of Authority signed by Mr. Zheng as president of Pacific World Buffet; the corporation's part-quarterly sales and use tax returns for the months of July 2009, August 2009, September 2009 and October 2009, each of which Mr. Zheng signed; the corporation's quarterly sales and use tax returns for the periods March 1, 2009 through May 31, 2009, June 1, 2009 through August 31, 2009 and September 1, 2009 through November 30, 2009, each of which Mr. Zheng signed; the corporation's Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for the period January 1, 2009 through March 31, 2009 signed by Mr. Zheng as president of Pacific World Buffet; the corporation's Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for the period April 1, 2009 through June 30, 2009 signed by Mr. Zheng; Pacific World Buffet's 2008 Form CT-4 for the tax period June 4, 2008 through May 31, 2009 signed by Mr. Zheng as the authorized person; and Pacific World Buffet's 2008 Form CT-3M/4M for the tax period June 4, 2008 through May 31, 2009 signed by Mr. Zheng as the authorized person. As noted in Finding of Fact 5, the Division issued a Notice of Determination to Mr. Zheng as an officer or responsible person of Pacific World Buffet.

12. By power of attorney dated July 20, 2011, Mr. Zheng, as president, appointed Kent Fok, CPA, to represent Pacific World Buffet before the Division in connection with sales and use taxes for the period March 1, 2009 through February 28, 2010.

13. On July 21, 2011, a petition was filed by Pacific World Buffet challenging the Notice and Demand issued to it. This petition was signed by Ji Chao Zheng, as president of Pacific World Buffet.

14. In his petition challenging the Notice of Determination (Notice number L-034981171), Mr. Zheng asserts, among other things, that the actual owner and person responsible for Pacific World Buffet is Tin Ming Cheng, residing in Flushing, New York. Mr. Zheng further asserts that he and his son were hired by Mr. Cheng on the condition that Mr. Zheng sign documents for Pacific World Buffet as president.

15. At the hearing, Pacific World Buffet's representative conceded that the self-reported sales and use tax amount, and the corporation's liability for the same, was correct.

16. Although present at the hearing on June 5, 2013, petitioner Ji Chao Zheng did not testify. Rather, petitioners' sole witness was Wei Xin Liu, who testified through an interpreter.

17. Petitioners submitted the affidavit of Tin Ming Cheng into the record. In his affidavit, Mr. Cheng avers that he is the owner and person responsible for all operational and financial matters of Pacific World Buffet. Mr. Cheng further avers that he promises to pay all taxes due, which includes any and all sales tax for Pacific World Buffet. No supporting documentation was attached to Mr. Cheng's affidavit.

18. Petitioners submitted a letter dated September 20, 2012 from Mr. Zheng's representative, Mr. Fok, to the Division's representative, Michael Infantino, Esq. In the letter, Mr. Fok wrote, in pertinent part, as follows:

According to the information provided by my client Ji Chao Zheng, he was only a cook at Pacific World Buffet Inc. The actual owner and responsible person of Pacific World Buffet Inc. was Tin Ming Cheng He resides at . . . , Flushing, NY 11355. Ji Chao Zheng only agreed to be the signer of corporate documents as a condition of employment for him and his son. All legal responsibilities and taxes dues [sic] remain with Tin Ming Cheng, the actual owner of Pacific World Buffet Inc. Ji Chao Zheng is unemployed and he has no money to pay any tax now. He suggests the NYS Tax Department has [sic] Tin Ming Cheng get involved liability for the case. Tin Ming Cheng is willing to pay all tax dues [sic] including sales taxes for Pacific World Buffet Inc. A statement from Tin Ming Cheng is enclosed for your reference.

19. Petitioners submitted the unsworn statement of Tin Ming Cheng into the record. In this undated statement, Mr. Cheng claims that he is the responsible person for all types of tax of Pacific World Buffet from March 1, 2009 to December 12, 2009. He further claims that he will pay all tax due, including sales tax of Pacific World Buffet when he has money.

20. At the Division's representative's request, Mr. Mirochink searched the Division's computer system and was unable to find any documentation pertaining to Pacific World Buffet bearing Mr. Cheng's name.

21. The record does not include Pacific World Buffet's articles of incorporation, bylaws, or its corporate minute book. Nor does it include any books and records of the corporation.

SUMMARY OF PETITIONERS' POSITION

22. Petitioners maintain that petitioner Ji Chao Zheng agreed to sign corporate documents only as a condition of employment for him and his son. They further maintain that Mr. Zheng was merely a cook, who worked under second chef, Wei Xin Liu. Petitioners claim that Ting Meng Cheng's affidavit and the testimony of Mr. Liu clearly prove that Mr. Cheng is the actual owner and person responsible for all financial and operational matters of Pacific World Buffet. Petitioners further claim that Mr. Cheng, in his affidavit, agreed to pay all taxes due for Pacific World Buffet. As such, petitioners contend that Mr. Cheng, the actual owner of Pacific World

Buffet, should be liable for all tax liabilities and debts of the corporation. They further contend that the Division should contact Mr. Cheng regarding Pacific World Buffet's tax liabilities.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction; its powers are limited to those conferred by its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin, v. Tax Appeals Tribunal*, 151 Misc 2d 326, 573 NYS2d 140 [1991]).

Accordingly, absent legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

B. The Division of Tax Appeals is authorized to "provide a hearing as a matter of right, to any petitioner upon such petitioner's request . . . , unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter" (Tax Law § 2006[4]).

C. The Division of Taxation is authorized to issue a notice and demand for payment of sales and use taxes reported due where a taxpayer fails to remit payment with its return and for penalties arising from failure to timely file or failure to timely remit payment for the amount reported due (*see* Tax Law § 173-a[3][a], [b][1]). Such a notice and demand may not be construed as a notice which gives a person a right to a hearing in the Division of Tax Appeals (*see* Tax Law § 173-a[3][c]).

D. Accordingly, Pacific World Buffet's right to a hearing in the Division of Tax Appeals with respect to the notice and demand for payment of sales and use tax for the period December 1, 2009 through February 28, 2010 is specifically denied pursuant to Tax Law § 173-a(2) and (3)(c). The Division of Tax Appeals thus lacks subject matter jurisdiction to consider the merits of Pacific World Buffet's protest of such notice and demand (*see* Tax Law § 2006[4]; *Matter of*

Chait, Tax Appeals Tribunal, April 22, 2010).

E. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

The mere holding of corporate office does not, per se, impose tax liability upon an officeholder (*see Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]; *Matter of Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427 [1978]; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed* 214 AD2d 857, 625 NYS2d 343 [1995], *lv denied* 86 NY2d 705, 632 NYS2d 498 [1995]). Rather, whether a person is an officer or employee liable for tax must be determined upon the particular facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564 [1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862 [1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239 [1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether a person is authorized to sign the corporation's tax returns, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]). As summarized in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

[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 (*Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 564, 565; *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Vogel v. New York State Dept. of Taxation & Fin.*, *supra*, 413 NYS2d at 865; *Chevlowe v. Koerner*, *supra*, 407 NYS2d at 429; *Matter of William Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin*, *supra*; *Matter of Autex Corp.*, *supra*).

F. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino*; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). In order to prevail, "petitioner was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own (citations omitted)" (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998).

G. The facts in this case indicate that petitioner Ji Chao Zheng was a responsible officer of the corporation. Mr. Zheng was president of the corporation and, in that capacity, he signed the Application to Register for a Sales Tax Certificate of Authority, part-quarterly sales and use tax returns, quarterly sales and use tax returns, quarterly combined withholding wage reporting and unemployment insurance returns, the corporate franchise tax return and the corporate MTA surcharge return. There is no evidence that Mr. Zheng's authority as president was restricted in any way. The record does not include the corporate bylaws that would have provided the powers

and duties of the president. Furthermore, petitioner failed to take the stand to testify. Therefore, the strongest negative inference must be drawn from Mr. Zheng's failure to testify about his responsibilities as president of the corporation (*see Noce v. Kaufman*, 2 NY2d 347, 161 NYS2d 1 [1957]; *Milio v. Railway Motor Trucking Co.*, 257 App Div 640, 15 NYS2d 73 [1939]). The foregoing facts clearly indicate that petitioner was a responsible officer of Pacific World Buffet.

H. Mr. Zheng contends that he was merely a cook, without any real responsibilities, and Tin Ming Cheng was the actual owner and person responsible for all financial and operational matters of Pacific World Buffet. He claims that Mr. Cheng, in his affidavit, acknowledged his ownership and responsibility for all of the corporation's financial and operational matters and promised to pay any and all sales taxes due for the corporation. Mr. Zheng further claims that the testimony of Mr. Liu, second chef, clearly proves that he worked under Mr. Liu as a cook, and that Mr. Cheng was responsible for all financial and operational matters of the corporation.

Mr. Zheng's arguments are without merit. He did not submit the articles of incorporation, corporate bylaws, minutes of corporate meetings or any documentation concerning investments into the corporation. Mr. Zheng also did not submit any of the corporation's books and records. However, he did submit Mr. Cheng's affidavit. I cannot accord any weight to Mr. Cheng's affidavit. It merely contains the vague statement that Mr. Cheng is the owner and person responsible for all operational and financial matters of Pacific World Buffet. There are no details regarding his alleged ownership of the corporation or his alleged responsibilities related to the corporation's operations and financial matters. The record contains no documentation supporting Mr. Cheng's claimed ownership of Pacific World Buffet or his claimed responsibility for the operational and financial matters of the corporation. As noted above, Mr. Zheng failed to testify at the hearing. Rather, Mr. Zheng presented the testimony of Mr. Liu, his sole witness. Mr. Liu

testified about his alleged employment at the restaurant and alleged conversations he had with Mr. Zheng. I find Mr. Liu's testimony to be vague and very confusing. Since there is no documentary evidence to support Mr. Liu's testimony, I must reject it. It is noted that Pacific World Buffet's Application to Register for a Sales Tax Certificate of Authority listed information for only one responsible person, Mr. Zheng, president of the corporation. As Pacific World Buffet's sole corporate officer, Mr. Zheng had a fiduciary duty to the corporation in complying with the corporation's tax obligations (*see Matter of Martin v. Commissioner of Taxation & Fin.* at 891, 558 NYS2d at 240; *Matter of Goodfriend*; *Matter of Ross*, Tax Appeals Tribunal, August 1, 1996). The record contains no evidence of any restrictions on Mr. Zheng's ability or authority to inspect the corporate books and records. The record reveals no physical or legal impediment to inquiring or acting, nor of being deliberately misled, lied to or thwarted in the face of inquiries or other efforts to assure compliance with Pacific World Buffet's tax obligations. Simply put, the record does not support the conclusion that Mr. Zheng did not have or could not have exercised sufficient authority and control over corporate affairs to assure that sales tax was collected and remitted (*Matter of Goodfriend*; *Matter of Harshad Shah*, Tax Appeals Tribunal, February 25, 1999).

I. Based upon assertions made in Mr. Cheng's affidavit, Mr. Zheng contends that Mr. Cheng should be held responsible for the sales tax due from Pacific World Buffet. It is not a defense, however, to Mr. Zheng's position that another party may also be liable for taxes due from the corporation.

Tax Law § 1133(a) provides that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article" (emphasis added), thereby creating joint and several liability for unpaid sales tax

(*Matter of Phillips*, Tax Appeals Tribunal, May 11, 1995). The Division is under no obligation to pursue another responsible person before proceeding against petitioner (*Matter of Risoli v. Commissioner of Taxation and Finance*, 237 AD2d 675, 654 NYS2d 218 [1997]).

Accordingly, petitioner Ji Chao Zheng is a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133 and is personally liable for the sales tax due on behalf of Pacific World Buffet for the period December 1, 2009 through February 28, 2010.

J. Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for the failure to file a return or to pay or pay over the sales and use tax due within the time required. Such penalty may be abated pursuant to Tax Law § 1145(a)(1)(iii) when the taxpayer establishes that such omission was due to reasonable cause and not due to willful neglect. In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catchall provision which provides for a finding of reasonable cause based upon any ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable case for delay, demonstrating an absence of willful neglect (20 NYCRR 2392.1[d][5]). The taxpayer bears the burden of establishing that the actions were based upon reasonable cause and not willful neglect (*see Matter of Philip Morris*, Tax Appeals Tribunal, April 29, 1993; *Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978, 598 NYS2d 360 [1993]; 20 NYCRR 3000.15[d][5]). Mr. Zheng has not presented any evidence or argument warranting waiver of the penalties asserted.

K. The petition of Pacific World Buffet, Inc., is hereby dismissed.

L. The petition of Ji Chao Zheng is denied and the Notice of Determination dated November 8, 2010 is hereby sustained.

DATED: Albany, New York
June 5, 2014

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE