

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

:
of

CHUANMIN SHI

: DETERMINATION

DTA NO. 828139

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 March 1, 2013 through February 28, 2015.

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Petitioner, Chuanmin Shi, 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 March 1, 2013 through February 28, 2015.

A hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on November 29, 2018, with all briefs to be submitted by May 3, 2019, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Larry Kars, Esq., and Jeffrey Eng, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel).

ISSUE

Whether petitioner was personally liable for the sales and use taxes due on behalf of New Shanghai Tan Restaurant, as a person required to collect and pay such taxes under Tax Law §§ 1131 (1) and 1133 (a) for the period March 1, 2013 through February 28, 2015.

FINDINGS OF FACT¹

1. In February 2015, the Division of Taxation (Division) commenced an audit of New Shanghai Tan Restaurant (the restaurant) located in Flushing, New York. Prior to an appointment letter being sent to the restaurant, the Division performed a survey of it. The survey worksheet indicates the restaurant was a full service restaurant with 19 tables and seating for 96 patrons.

2. On March 24, 2015, the Division's auditor scheduled an audit appointment for April 17, 2015. Included with the audit appointment letter was a request for records to be made available for the period June 1, 2012 through February 28, 2015, as well as a blank power of attorney form (POA).

3. On April 16, 2015, the auditor contacted the restaurant to confirm the audit appointment and left her contact information with an employee at the business location. Later that day, the restaurant's representative telephoned the auditor to request that the audit appointment be postponed.² The purported representative informed the auditor that the restaurant's owner was incarcerated and that the owner's son would deliver the POA form to his mother when he visited her in jail. The auditor was also informed that the restaurant was no longer in business.

¹ Pursuant to State Administrative Procedure Act (SAPA) § 307 (1), petitioner submitted with its brief 21 separately numbered proposed findings of fact. Proposed findings of fact 1 through 20 have been modified or expanded to more accurately or fully reflect the record, remove conclusory information, or delete irrelevant or immaterial portions thereof, and as so modified or expanded, have been accepted, renumbered and set forth herein. Proposed finding of fact 21 has been rejected as it is a statement of opinion and not factual in nature.

² The representative's name, as well as other names contained in the audit file, were redacted by the Division. Petitioner withdrew his objection to the redacted audit file being admitted into evidence based upon the Division's stipulation that all references to petitioner were not redacted. No explanation was proffered by the Division for the redactions.

4. Between April 16, 2015 and December 21, 2015, the auditor made numerous follow-up telephone calls with the purported representative inquiring about a POA for the restaurant and also issued a second request for the restaurant's sales tax records for the period under audit. During various telephone calls, the auditor was told that the owner's son, David, would have his mother execute a POA for the restaurant and forward it to the auditor. No sales tax records or a POA were ever received by the Division.

5. Because no sales tax records were ever provided, the auditor resorted to use of an estimated audit methodology. To calculate taxable sales, the Division utilized the 2014 edition of the Restaurant Industry Operations Report by the National Restaurant Association and Deloitte & Touche LLP (RIOR) to estimate taxable sales using annual sales per seat of \$10,117.00 taken from the RIOR. Based on this index, the auditor estimated that the restaurant had \$2,240,791.00 in additional taxable sales during the period June 1, 2012 through February 28, 2015, resulting in additional sales tax due of \$198,870.20.

6. On April 29, 2016, the Division issued a notice of determination to the restaurant asserting sales tax of \$198,870.20 plus interest and penalties for the period September 1, 2012 through February 28, 2015.

7. Thereafter, on May 2, 2016, the Division issued a notice of determination (L-044695821) to petitioner, Chuanmin Shi, as a responsible person for the restaurant for the period March 1, 2013 through February 28, 2015, asserting sales tax of \$161,212.24 plus interest and penalties.

8. The Division's determination that petitioner was a responsible person for the restaurant is based upon the following:

(i) the restaurant's electronically filed sales tax returns for the quarters ended August 31, 2012 through August 31, 2014. Each of these returns indicate that they were submitted by "C Shi;"

(ii) the restaurant's quarterly combined withholding, wage reporting, and unemployment insurance returns (form NYS-45-ATT) for the quarters ended September 30, 2009, September 30, 2011, December 31, 2011 and December 31, 2012 indicating that the restaurant paid wages to petitioner. The return for the quarter ended December 31, 2012 does not report wages paid to petitioner for that quarter, but reports a cumulative total alleged to have been paid to petitioner for all of 2012; and

(iii) the restaurant's application to register for a sales tax certificate of authority electronically submitted by petitioner on April 24, 2009.

9. Petitioner appeared at the hearing in this matter with the aid of a Mandarin interpreter. Petitioner credibly testified that prior to the period in issue, he held an ownership interest in the restaurant but relinquished it to Fu Ling Shi in 2012 as more and more of his time was spent in China during that time caring for his sick father.³ Select pages of petitioner's passport were introduced into evidence at the hearing confirming that petitioner was in China a significant portion of the time during the later part of 2011 through the middle of 2013.⁴ Petitioner testified that he was neither employed nor was he an officer or director of the restaurant during such time and had no check signing authority or the ability to hire and fire employees. Petitioner had no

³ Petitioner and Fu Ling Shi are not related.

⁴ No other documentation was submitted establishing petitioner's whereabouts on any particular day to confirm his location inside or outside the greater New York City area other than the passport pages.

access to the restaurant's computers nor did he know where the corporate checkbook was located.

10. As support for his testimony, petitioner presented the affidavits of Oi Ping Lam and Longxiang Zhao. In her affidavit, Ms. Lam avers that she is a friend of both petitioner and Fu Ling Shi, having known each of them for over 15 years. Ms. Lam avers that Fu Ling Shi became the sole owner of the restaurant in or around May 2012 based upon conversations she had with each of them around that time. Mr. Zhao is also an acquaintance of petitioner and Fu Ling Shi. Mr. Zhao avers that, based upon conversations he had with both petitioner and Fu Shing Shi, it was his understanding that petitioner transferred his ownership interest in the restaurant to Fu Ling Shi in or around May 2012 because petitioner was in China a majority of the time.

11. Included in the Division's exhibits were copies of: (i) Bond Form L-9, bond in support of application for license or permit under the New York Alcoholic Beverage Control Act dated November 13, 2012; (ii) New York State Liquor Authority renewal application, dated October 12, 2012; and (iii) a retail renewal signature page dated November 15, 2012. These three documents were purportedly signed by petitioner. Petitioner claimed that the signatures appearing on these documents are not his signature. In support of his testimony, petitioner presented a handwriting report prepared by forensic document examiner Jeffrey H. Luber, who is located in East Northport, New York. Mr. Luber's report indicates he is a Diplomate of the American Board of Forensic Document Examiners and a member of the Northeastern Association of Forensic Scientists, the American Academy of Forensic Sciences and the American Society of Questioned Document Examiners. Mr. Luber's report was admitted into evidence without objection by the Division. Mr. Luber examined copies of these three

documents and compared the signatures thereon against petitioner's known signatures including: (a) Western Union money order dated October 10, 2011; (b) petitioner's United States passport issued on August 19, 2013; (C) petitioner's naturalization papers dated August 16, 2013; (d) petitioner's New York State identification card issued on August 3, 2018; (e) petitioner's New York State driver license issued February 6, 2009; (f) Western Union Money order dated July 9, 2012; and (g) form 1-131 dated September 24, 2006. The report concludes that petitioner did not sign his name on the three questioned documents. The handwriting conclusion is based upon the combination of numerous handwriting habit pattern differences found within the known writing of petitioner and the habit patterns found within the questioned signatures of his name as depicted on each of questioned items.

12. Petitioner also denied submitting the sales tax returns the Division has relied upon in determining petitioner was a responsible person for the restaurant's sales tax obligations. The email address of the submitter of these returns is lionelychiwoo@yahoo.com. Petitioner identified Chi Tsai Woo as the restaurant's accountant. Petitioner presented unredacted copies of checks written from the checking account of Mr. Woo that were used to make payments of some of the restaurant's sales tax liabilities. Petitioner credibly testified that he did not authorize sales tax returns to be filed using his name nor did he direct Mr. Woo to pay the restaurant's liabilities.

13. Attached to the petition was a notarized letter dated June 29, 2016 of Mr. Woo. Mr. Woo states that he prepared the restaurant's federal 1120 returns for the tax years 2009 through 2014 and indicates that in March 2012, petitioner surrendered his ownership interest in the restaurant to Fu Ling Shi. Included with the petition were copies of the restaurant's filed federal form 1120 for the tax years 2012, 2013 and 2014. The form 1120 indicates that Fu Ling Shi was

the sole shareholder of the restaurant during these years. These returns were all filed on or about November 6, 2016 and were signed by Fu Ling Shi's son, David Goa, who indicated he was the restaurant's manager. These returns were all prepared by Mr. Woo. At the hearing in this matter, petitioner submitted another notarized letter from Mr. Woo dated November 7, 2016. In this letter, Mr. Woo alleges that Fu Ling Shi was his only contact person at the restaurant during 2012 through 2014 and that she held herself out to be the sole owner.

14. At some point in 2014, former employees of the restaurant brought a lawsuit under the Fair Labor Standards Act (FLSA) (29 USC §§ 201 *et seq.*) against the restaurant, and successor entities, as well as the former owner and managers of the restaurant (*see Chen v DG&S NY, Inc.*, No. 14CV03435, 2016 WL 5678543 [EDNY Sept. 29, 2016]). In that action, the parties therein disagreed over who owned the restaurant but agreed that it was managed in part, by Zhe Ming Liu and, until she was arrested in December 2013, Fu Ling Shi (*id.*). Following her arrest, her son, David Goa, ran the restaurant and, in December, 2014, he set up a successor corporation that ran the restaurant operations in the same location. Petitioner is not named as an owner or manager in that action.

15. Fu Ling Shi's arrest was the result of a two count indictment filed in the Southern District of New York (13 Crim 949) wherein Fu Ling Shi and 22 other conspirators were charged with obtaining stolen credit/debit card information to manufacture counterfeit credit/debit cards that were encoded with the stolen account information.⁵ Merchandise would then be purchased

⁵ Official notice of the record of the proceedings in *Matter of United States v Fu Ling Shi*, (13 CR 949) is taken pursuant to State Administrative Procedure Act § 306 (4). Pursuant to State Administrative Procedure Act § 306 (4) official notice can be taken of all facts of which judicial notice could be taken. The Division of Tax Appeals may take official notice of official court records and filings from other state and federal actions and proceedings. (*see e.g. RGH Liquidating Trust v Deloitte & Touche LLP*, 71 AD3d 198, 207-208 [1st Dept 2009] *revd on other grnds* 17 NY3d 397 [2011]).

using the counterfeit cards and either returned to the vendor for cash refunds or sold. At Fu Ling Shi's bail hearing, her attorney explained that her son had taken over running the restaurant since her arrest and that there was no one else in a position to run the restaurant. At Fu Ling Shi's bail hearing, the Assistant United States Attorney stated that she used the restaurant as a front for the counterfeit credit card operation and that she and her co-conspirators had the ability to create counterfeit documents. Fu Ling Shi pled guilty to one count of conspiracy to commit access device fraud, was sentenced to 57 months in prison, and was subject to forfeiture of \$800,000.00 in addition to specific property.

CONCLUSIONS OF LAW

A. Tax Law § 1133 (a) states 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 . . ." Tax Law § 1131 (1), during the years at issue, in turn defined a "person required to collect any tax imposed by this article [article 28]" to 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. Whether a person is a responsible officer must be determined based upon the particular facts of each case (*see Matter of Coppolla v Tax Appeals Tribunal*, 37 AD3d 901 [3d Dept 2007]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [3d Dept 1991]). Factors stated by the Division's regulations include whether the person was authorized to sign the corporate tax return, responsible for managing or maintaining the corporate books or permitted to generally manage the corporation (20 NYCRR 526.11 [b] [2]).

C. The Tax Appeals Tribunal, in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), stated:

“[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 862, 865; *Chevlowe v. Koerner, supra*, 407 NYS2d 427, 429; *Matter of William D. Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin, supra*; *Matter of Autex Corp., supra*).”

D. In proceedings before the Division of Tax Appeals, petitioner generally bears the burden of proving, by clear and convincing evidence, that the notice of determination is erroneous. Based upon a careful review of the record, petitioner has shouldered that burden. While it is clear that petitioner owned some portion of the restaurant in 2009 when it was incorporated, it is equally clear that as of May 2012 petitioner was no longer associated with the restaurant as confirmed by his credible testimony, the federal income tax filings indicating Fu Ling Shi was the sole shareholder, and the affidavits contained in the record. In addition, the civil and criminal court proceedings involving Fu Ling Shi lead to the conclusion that she and her son were responsible for the restaurant’s sales tax obligations during the period in question. It is telling that although the Division has claimed petitioner was under a duty to act on behalf of the restaurant, petitioner was not named as a defendant in the FLSA action brought by the restaurant’s former employees.

E. The Division's evidence supporting its position that petitioner was a responsible person of the restaurant is simply not persuasive. First, although the restaurant's withholding tax returns contained in the hearing record report that wages were paid to petitioner, these returns are for periods when petitioner admittedly held an ownership interest in the restaurant. Petitioner has denied being paid wages by the restaurant during the period in issue and there is no evidence that petitioner did receive wages during that time period.

Second, the electronically filed sales tax returns do not contain signatures but indicate that they were electronically submitted by "C Shi." Petitioner credibly denies submitting these returns. Given petitioner's denial and the email address of the submitter, it is evident that these returns were not submitted by petitioner, but were submitted by the restaurant's accountant, Mr. Woo. Without more, these returns are not irrefutable evidence that petitioner remained involved with the restaurant in any capacity. Along these lines, the liquor license renewal and bond and retail renewal that the Division has also relied on to support its assertion of liability against petitioner based upon his signatures purportedly appearing thereon have been refuted by petitioner. The handwriting report of Mr. Luber convincingly establishes that the signatures appearing thereon were not made by petitioner. In its brief, the Division has asserted that the report should be accorded no evidentiary value as Mr. Luber did not testify at the hearing nor was the report authenticated. In its reply brief, petitioner submitted Mr. Luber's *curriculum vitae* as evidence of Mr. Luber's qualifications to render such report. This post hearing submission has not been considered in rendering this determination. The Tax Appeals Tribunal has held that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final (*see Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). If

the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record (*see Matter of Moore*, Tax Appeals Tribunal, June 28, 2001; *Matter of Emerson*, Tax Appeals Tribunal, May 10, 2001; *Matter of Schoonover, supra*). Nonetheless, the handwriting report has been properly considered as the Division, having failed to object to the admission of the report at the hearing, has waived any objection to the report's admission and consideration (*see Matter of Meluch v New York State and Local Police and Fire Retirement System, et al.*, 80 AD3d 976 [3d Dept 2011]). This report conclusively establishes that petitioner's signature was forged. Based upon the foregoing, it is clear that petitioner was not a person responsible for the collection and remittance of sales tax of New Shanghai Tan Restaurant during the period in issue.

F. The petition of Chuanmin Shi is granted and the May 2, 2016 notice of determination is cancelled.

DATED: Albany, New York
October 31, 2019

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE