

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
	:	
of	:	
	:	
LOUIS CAMBRIA	:	DECISION
	:	DTA NO. 801046
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 June 1, 1981	:	
through May 31, 1982.	:	

Petitioner, Louis Cambria, 208 Sterling Avenue, Buffalo, New York 14216, filed an exception to the determination of the Administrative Law Judge issued on September 17, 1987 with respect to his 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 June 1, 1981 through May 31, 1982 (File No. 801046). Petitioner appeared by Daniel G. Tronolone, Esq., P.C. (John B. Surgalla, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

The petitioner filed a brief on exception; the Division filed a letter in opposition to the exception. Oral argument was requested by the petitioner and then the request was withdrawn. At the request of the Tribunal, supplemental briefs concerning the effect of L 1985, ch 65 on the issues herein were submitted by both parties.

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

ISSUE

Whether petitioner was a person required to collect and pay over sales taxes on behalf of Cambria's Theater District Cuisine, Ltd. d/b/a Cambria's Old Spain within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the period June 1, 1981 through May 31, 1982.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts may be summarized as follows:

On June 20, 1983, following an audit, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Louis Cambria.¹ The Notice asserted \$109,881.53 in tax due for the period June 1, 1981 through May 31, 1982, plus penalty and interest. The tax asserted due from petitioner was based on the results of an audit of Cambria's Theater District Cuisine, Ltd. d/b/a Cambria's Old Spain (the "corporation"), and upon the assertion that petitioner was personally liable for sales tax due from the corporation pursuant to sections 1131(1) and 1133 of the Tax Law.

Petitioner presented no evidence to refute the results of the audit.

The corporation commenced operations in December 1980 under the name Cambria's Old Spain, a restaurant located at 654 Main Street, Buffalo, New York. Petitioner, Louis Cambria, became involved with the enterprise prior to its incorporation. Although not an investor himself, Mr. Cambria became involved with the corporation's investors prior to the incorporation because he had developed a reputation of some standing in the Buffalo area as a restaurateur. At hearing, Mr. Cambria indicated that the enterprise was initially his idea, stating: "I picked up the investors. I started it."

Petitioner's reputation led to the corporation's use of his name in an effort to attract business. Mr. Cambria had been involved in the restaurant business "for some time", having been involved in a restaurant which "was rated one of the top ten years back". Additionally, Mr. Cambria's reputation

¹ A Notice of Determination and Demand was also issued in the same amount on the same date to Amelia Cambria. This Notice is no longer in controversy because the Administrative Law Judge cancelled it and no exception was taken to such cancellation.

was such that, as he stated at hearing, the City of Buffalo wanted him to "open up the Theater District because of the draw [he] made".

Mr. Cambria was elected Chairman of the Board of Directors of the corporation at its inception and remained Chairman throughout the period of his association with the corporation. He regularly attended board meetings and was entitled to vote at such meetings. Mr. Cambria was not an officer of the corporation.

Prior to the commencement of operations, Mr. Cambria hired the restaurant's staff. He also hired an accountant for the corporation. Subsequent to the restaurant's commencement of operations, Mr. Cambria was involved in the hiring and firing of personnel, acting in consultation with the restaurant's manager before taking action.

Although he did not consider himself an investor in the corporation, Mr. Cambria did provide the corporation with the use of "a lot of my personal equipment that I brought in there from my other restaurants". Subsequent to his departure from the corporation, Mr. Cambria was unable to retrieve this equipment.

Mr. Cambria had the authority to sign checks on the corporation's behalf throughout the period of his association with the corporation. This authorization extended to both the corporation's regular checking account and its payroll account. Mr. Cambria recalled going to the local bank offices to sign the signature cards for these accounts, but stated that he could not recall signing any corporate checks. Mr. Cambria subsequently stated that he "could have signed a few" expense checks for the corporation.

Mr. Cambria worked at the restaurant during the evening from approximately 6:00 P.M. through closing at midnight or 2:00 A.M. His day-to-day duties involved greeting patrons, remaining on the floor of the restaurant and generally making himself visible. Mr. Cambria considered himself a public relations director of the corporation. He did not receive a salary for the performance of these duties. He was employed elsewhere, where he was paid a salary, during regular business hours.

The day-to-day management of the corporation's books and records during the period at issue was handled by its bookkeeper. This individual also prepared all tax returns on behalf of the corporation. Mr. Cambria did not sign any tax returns on the corporation's behalf, nor did he review the corporation's books and records.

The president of the corporation was in charge of the day-to-day management. This individual signed most checks on the corporation's behalf, including payroll checks.

Mr. Cambria was not directly involved in the determination of which creditors of the corporation would be paid, although, on occasion, certain of the corporation's creditors approached him regarding payment. On such occasions, Mr. Cambria spoke with the corporation's bookkeeper or manager on the matter.

The corporation experienced financial problems soon after its commencement of operations and, in June of 1981, the Board directed the formation of a financial committee to oversee the corporation's finances. At hearing, Mr. Cambria stated that he was not named to this committee. The financial committee did not report to Mr. Cambria with any regularity regarding the corporation's finances.

Mr. Cambria's relationship with the corporation was terminated by vote of the Board of Directors on January 11, 1982. He had no involvement with the corporation subsequent to his termination.

Mr. Cambria contended that his responsibilities were limited to those involving his "greeting" duties. He further contended that he was named Chairman of the Board because of his name and that he was a figurehead Chairman. He did state, however, that the financial committee directed him to "cut down on the payroll" by firing employees. At hearing, Mr. Cambria was unsure whether or not he had complied with this directive stating: "I don't recall if I have or not because we were getting parties and busy, I don't recall if I did that". When asked at hearing whether he had, on any occasion, hired or fired anyone without consulting someone else, Mr. Cambria replied that he had always consulted with the manager.

The corporation's certificate of registration for sales tax purposes did not include Mr. Cambria among the corporation's principal officers or owners.

OPINION

The Administrative Law Judge determined that petitioner was a person required to collect tax on behalf of the corporation within the meaning of section 1131(1) of the Tax Law for the period June 1, 1981 through January 11, 1982. We reverse.

For the period in issue, section 1131(1) of the Tax Law provided in pertinent part that:

"(1) 'Persons required to collect tax' . . . shall also include any officer or employee of a corporation or of a dissolved corporation . . . who as such officer or employee is under a duty to act for such corporation"

Petitioner's only formal involvement with the corporation in this case was that of director. Petitioner was not an employee, officer nor an investor in the corporation.

Chapter 65 of the Laws of 1985 amended section 1131(1) adding "director" to those specifically listed as potentially responsible persons. This amendment took effect on the first day of the first quarterly period after the law took effect (L 1985, ch 65, §160[j]). The effective date was September 1, 1985.

In itself, the addition of the term "director", which was a material change in the statute, indicates a legislative construction that the law prior to its amendment did not impose liability upon directors of corporations (see, Harzinski v. Village of Endicott, 126 AD2d 56; Broom v. Murphy, 14 AD2d 639; McKinney's Cons Laws of NY, Book 1, Statutes § 193).

This conclusion is further evidenced by material in the bill jacket for Chapter 65 which includes a letter from the Commissioner of the Department of Taxation and Finance recommending executive approval of the bill on the basis of a memorandum in support prepared by his staff. This memorandum states that the addition of the word "director" to section 1131 would "extend personal liability to responsible directors of corporate vendors . . .". This explanation of the provision as extending liability to directors was also given in a commentary on Chapter 65 (Blaustein, Omnibus Tax Equity and Enforcement, 58 NYSBJ 8, 14 [1986]).

Considered together, the amendment itself and the legislative material surrounding its enactment indicate that prior to this amendment of section 1131(1) of the Tax Law the status of director did not subject a person to personal liability for sales tax due from a corporation.

Since the record indicates no other relationship between the petitioner and the corporation upon which to base his personal liability, and since the period involved here precedes the effective date of the relevant provision of Chapter 65, we find that petitioner may not be held liable for the taxes due from Cambria's Theater District Cuisine, Ltd.

We are aware that in United States v. Graham (309 F2d 210 [9th Cir 1962]), the Court of Appeals for the Ninth Circuit reached a different conclusion with respect to the similar language of section 6671(b) of the Internal Revenue Code defining "person". In Graham, the Court held that the words "includes an officer or employee of a corporation" were merely illustrative and were not words of limitation. The Court concluded that the status of director did not necessarily exclude an individual from the definition of "person". While the analysis of the Graham decision would otherwise be persuasive, its impact here is diminished because in Graham the Court was not confronted with a legislative enactment and the evidence of legislative intent directing our interpretation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Louis Cambria to conclusions of law "C" and "F" of the Administrative Law Judge's determination is granted;
2. Conclusion of law "C" of the Administrative Law Judge's determination and so much of conclusion of law "F" as denied Louis Cambria's petition are reversed, and except as so reversed, such determination is otherwise sustained; and

3. The petition of Louis Cambria is granted and the Notice of Determination and Demand issued to him on June 20, 1983 is cancelled.

Dated: Albany, New York
September 1, 1988

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner