

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**EDELGARD DREW** : DECISION  
 : DTA NO. 810696  
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, 1983 through November 30, 1989. :

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on April 21, 1994 with respect to the petition of Edelgard Drew, RR #2, Box 1220-13, Afton, New York 13730. Petitioner appeared by Stafford, Trombley, Purcell, Lahtinen, Owens and Curtin, P.C. (Dennis D. Curtin, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief which was received on September 8, 1994, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

***ISSUE***

Whether petitioner Edelgard Drew is a person required to collect tax under Tax Law § 1131(1) so that she is personally liable for sales tax determined due from Hunters Horn Inn for the period March 1, 1983 through November 30, 1989 and, if so, whether penalty and that portion of interest exceeding the minimum interest should be cancelled.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set

forth below.

The Division of Taxation ("Division") introduced into evidence as its Exhibit "A" documents described by its representative as follows:

"[T]he petition of Clifford Drew together with the conciliation order, the power of attorney to Mr. Curtin, and the various notices of determination attached, which refer to the periods, actually, beginning March 1, '83 through November 30th, '89."

Upon review, included with the petition were the following 18 notices of determination issued against Clifford Drew, each dated February 1, 1991:

<u>Notice Number</u>	<u>Sales Tax Period Ending</u>	<u>Tax Asserted Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Asserted Due</u>
S910201779E (186) <sup>1</sup>	August 31, 1985	\$ 3,748.50	\$ 1,124.45	\$ 3,388.48	\$ 8,261.43
S910201780E (286)	November 30, 1985	3,315.97	994.59	2,811.45	7,122.01
S910201781E (386)	February 28, 1986	5,621.91	1,686.39	4,463.71	11,772.01
S910201782E (486)	May 31, 1986	3,626.98	1,087.89	2,685.95	7,400.82
S910201783E (187)	August 31, 1986	4,715.13	1,414.51	3,247.29	9,376.93
S910201784E (287)	November 30, 1986 <sup>2</sup>	4,171.03	1,251.30	2,665.01	8,087.34
S910201785E (387)	February 28, 1987 <sup>3</sup>	6,276.97	1,882.89	3,710.68	11,870.54
S910201786E (487)	May 31, 1987	4,049.64	1,214.76	2,202.03	7,466.43
S910201787E (188)	August 31, 1987	5,264.56	1,579.25	2,620.55	9,464.36
S910201788E (288)	November 30, 1987	4,657.17	1,397.11	2,112.66	8,166.94
S910201789E (388)	February 28, 1988	7,051.45	2,115.34	2,899.99	12,066.78
S910201790E (488)	May 31, 1988	4,549.37	1,364.73	1,679.73	7,593.83
S910201791E (189)	August 31, 1988	5,914.16	1,774.21	1,942.42	9,630.79
S910201792E (289)	November 30, 1988	5,231.75	1,569.37	1,513.48	8,314.60
S910201793E (389)	February 28, 1989	6,944.42	2,083.25	1,747.94	10,775.61
S910201794E (489)	May 31, 1989	7,234.92	2,098.00	1,551.30	10,884.22

1

The first digit of the three numbers in parentheses refers to the particular sales tax quarter and the last two digits reference the particular year. For example "(186)" references the first sales tax quarter of 1986. Despite the fact that such quarter ends on August 31, 1985, it is still the first sales tax quarter of 1986 since sales tax years run from June 1st to May 31st. The notices were not introduced in sequential order and the number coding proved helpful in reorganizing the notices in sequential order.

2

This notice contained a typographical error and referenced the quarter ending November 30, 1987.

3

This notice contained a typographical error and referenced the quarter ending February 28, 1978.

S910201795E (190)	August 31, 1989	6,656.65	1,730.65	1,186.50
	9,573.80			
S910201796E (290)	November 30, 1989	<u>0.00</u>	<u>705.68</u>	<u>98.21</u>
	<u>803.89</u>			
Totals		\$89,030.58	\$27,074.37	\$42,527.38
	\$158,632.33			

These notices were issued from the Division's Buffalo office and provided the same explanation:

"You are liable individually and as officer of Hunters Horn Inn under sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with section 1138(a) of the Law."

The following eight additional notices of determination, each dated February 1, 1991 and included in Exhibit "A", were issued against petitioner Edelgard Drew, not Clifford Drew:

<u>Notice Number</u>	<u>Sales Tax Period Ending</u>	<u>Tax Asserted Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Asserted Due</u>
S910201743E (483)	May 31, 1983	\$2,846.06	\$ 711.50	\$4,251.82	\$ 7,809.38
S910201744E (184)	August 31, 1983	3,409.14	852.25	4,841.99	9,103.38
S910201745E (284)	November 30, 1983	3,127.46	781.77	4,218.85	8,128.08
S910201746E (384)	February 28, 1984	3,943.94	985.79	5,050.22	9,979.95
S910201747E (484)	May 31, 1984	2,544.50	636.02	3,085.38	6,265.90
S910201748E (185)	August 31, 1984	3,307.85	826.79	3,792.98	7,927.62
S910201749E (285)	November 30, 1984	2,926.28	731.51	3,170.33	6,828.12
S910201750E (385)	February 28, 1985	4,469.36	1,117.26	4,570.66	10,157.28

No notice was included in Exhibit "A" for the sales tax quarter ending May 31, 1985 (485). The Conciliation Order dated January 17, 1992 issued against Clifford Drew, which was included in Exhibit "A", referenced notice numbers S910201770E through and including S910201796E. However, nine notices issued against Clifford Drew with numbers S910201770E through and including S910201778E were not made part of Exhibit "A". Furthermore, it is noted that Exhibit "A", as introduced at the hearing, did not have all of the notices in sequential order. Upon careful review of the exhibit, all of the notices were organized in sequential order, and it became clear that the above-described notices referenced in

the Conciliation Order were not included in the exhibit.

The Division introduced into evidence as its Exhibit "C" the petition of Edelgard Drew, which included the following 27 notices of determination issued against Mrs. Drew, each dated February 1, 1991:

<u>Notice Number</u>	<u>Sales Tax Period Ending</u>	<u>Tax Asserted Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Asserted Due</u>
S910201743E (483)	May 31, 1983	\$ 2,846.06	\$ 711.50	\$ 4,251.82	\$ 7,809.38
S910201744E (184)	August 31, 1983	3,409.14	852.25	4,841.99	9,103.38
S910201745E (284)	November 30, 1983	3,127.46	781.77	4,218.85	8,128.08
S910201746E (384)	February 28, 1984	3,943.94	985.79	5,050.22	9,979.95
S910201747E (484)	May 31, 1984	2,544.50	636.02	3,085.38	6,265.90
S910201748E (185)	August 31, 1984	3,307.85	826.79	3,792.98	7,927.62
S910201749E (285)	November 30, 1984	2,926.28	731.51	3,170.33	6,828.12
S910201750E (385)	February 28, 1985	4,469.36	1,117.26	4,570.66	10,157.28
S910201751E (485)	May 31, 1985 <sup>4</sup>	2,883.51	720.77	2,775.14	6,379.42
S910201752E (186)	August 31, 1985	3,748.50	1,124.45	3,388.48	8,261.43
S910201753E (286)	November 30, 1985	3,315.97	994.59	2,811.45	7,122.01
S910201754E (386)	February 28, 1986	5,621.91	1,686.39	4,463.71	11,772.01
S910201755E (486)	May 31, 1986	3,626.98	1,087.89	2,685.95	7,400.82
S910201756E (187)	August 31, 1986 <sup>5</sup>	4,715.13	1,414.51	3,247.29	9,376.93
S910201757E (287)	November 30, 1986 <sup>6</sup>	4,171.03	1,251.30	2,665.01	8,087.34
S910201758E (387)	February 28, 1987	6,276.97	1,882.89	3,710.68	11,870.54
S910201759E (487)	May 31, 1987	4,049.64	1,214.76	2,202.03	7,466.43
S910201760E (188)	August 31, 1987	5,264.56	1,579.25	2,620.55	9,464.36
S910201761E (288)	November 30, 1987	4,657.17	1,397.11	2,112.66	8,166.94
S910201762E (388)	February 28, 1988	7,051.45	2,115.34	2,899.99	12,066.78
S910201763E (488)	May 31, 1988	4,549.37	1,364.73	1,679.73	7,593.83
S910201764E (189)	August 31, 1988	5,914.16	1,774.21	1,942.42	9,630.79
S910201765E (289)	November 30, 1988	5,231.75	1,569.37	1,513.48	8,314.60
S910201766E (389)	February 28, 1989	6,944.42	2,083.25	1,747.94	10,775.61
S910201767E (489)	May 31, 1989	7,234.92	2,098.00	1,551.30	10,884.22
S910201768E (190)	August 31, 1989	6,656.65	1,730.65	1,186.50	9,573.80
S910201769E (290)	November 30, 1989	<u>0.00</u>	<u>705.68</u>	<u>98.21</u>	<u>803.89</u>
Totals		\$118,488.68	\$34,438.03	\$78,284.75	\$231,211.46

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This notice contained a typographical error and referenced the quarter ending May 31, 1988.

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This notice contained a typographical error and referenced the quarter ending August 31, 1989.

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This notice contained a typographical error and referenced the quarter ending November 30, 1987.

These notices were also issued from the Division's Buffalo office and provided the same explanation as noted above for the notices issued against Clifford Drew.

The Division is seeking payment of sales tax on the sales of Hunters Horn Inn, a Lockport (Niagara County) restaurant, over approximately a 6½-year period when no sales taxes were remitted. The notices of determination were issued against Clifford Drew and against Edelgard Drew as officers despite the fact that it does not appear that the restaurant was operated by a corporation, of which petitioners were officers.

Tuesday Ann Fuoco, who was employed as a waitress and bartender at Hunters Horn Inn, described the restaurant as follows:

"We had one large dining room, that wasn't very visible from the bar, that seated about 50 people, maximum 55, if you pushed it; and the kitchen came off of that dining room.

"The other side of the restaurant was a bar with a small -- we called it the 'lounge', a small . . . dining room that . . . had five tables . . . . And the bar had about six stools . . . ."

In calculating sales tax asserted as due, the Division accepted taxable sales as reported on 25 forms ST-100 and 2 forms ST-102, sales and use tax returns, late-filed on behalf of Warren and Edelgard Drew d/b/a Hunters Horn Inn. All 27 returns were signed by Edelgard Drew, with 23 signed on October 28, 1989 and received by the Division on November 13, 1989, and 4 signed on January 26, 1990 and received on January 30, 1990. The returns disclosed the following gross sales, taxable sales and tax due:

<u>Period Ending</u>	<u>Gross Sales</u>	<u>Taxable Sales</u>	<u>Tax Due</u>
(483) May 31, 1983	\$ 50,711.00	\$ 40,658.00	\$ 2,846.06
(184) August 31, 1983	60,765.00	48,702.00	3,409.14
(284) November 30, 1983	56,071.00	44,678.00	3,127.46
(384) February 29, 1984	70,428.00	56,342.00	3,943.94
(484) May 31, 1984	45,438.00	36,350.00	2,544.50
(185) August 31, 1984	59,069.00	47,255.00	3,307.85
(285) November 30, 1984	52,254.00	41,804.00	2,926.28
(385) February 28, 1985	79,810.00	63,848.00	4,469.36
(485) May 31, 1985	51,491.00	41,193.00	2,883.51
(186) August 31, 1985	66,937.00	53,550.00	3,748.50
(286) November 30, 1985	59,214.00	47,371.00	3,315.97
(386) February 28, 1986	100,391.00	80,313.00	5,621.91

(486) May 31, 1986	64,767.00	51,814.00	3,626.98
(187) August 31, 1986	84,199.00	67,359.00	4,715.13
(287) November 30, 1986	74,483.00	59,586.00	4,171.03
(387) February 28, 1987	112,089.00	89,671.00	6,276.97
(487) May 31, 1987	72,315.00	57,852.00	4,049.64
(188) August 31, 1987	94,010.00	75,208.00	5,264.56
(288) November 30, 1987	83,164.00	66,531.00	4,657.17
(388) February 28, 1988	125,919.00	100,735.00	7,051.45
(488) May 31, 1988	81,239.00	64,991.00	4,549.37
(189) August 31, 1988	105,610.00	84,488.00	5,914.16
(289) November 30, 1988	93,423.00	74,739.00	5,231.75
(389) February 28, 1989	99,206.00	99,206.00 <sup>7</sup>	6,944.42
(489) May 31, 1989	103,356.00	103,356.00	7,234.92
(190) August 31, 1989	95,095.00	95,095.00	6,656.65
(290) November 30, 1989	<u>91,648.00</u>	<u>91,648.00</u>	<u>6,415.36<sup>8</sup></u>
Totals	\$2,133,102.00	\$1,784,343.00	\$124,904.04

Clifford Drew, the son of Warren Drew and Edelgard Drew, testified that "somewhere between January of '89 and my father's passing away [in May of 1989]" he became aware that Federal withholding and social security taxes had not been paid by the restaurant. After his father's death in May of 1989, he learned that sales tax had also not been paid by the business. The late-filed sales tax returns were prepared at the request of a "State tax agent, at which time I went to Mr. Carney and asked for these returns." William Carney was described by Clifford Drew as the accountant of his father, Warren Drew. Mr. Carney prepared the returns which were signed by Clifford Drew's mother, Edelgard Drew.

Edelgard Drew testified that she first became aware that sales tax had not been paid when the returns were submitted to her for signing. Mrs. Drew testified that she never reviewed with her husband, Warren Drew, the filing of returns or the payment of sales tax:

"I tried to [discuss the filing of returns and payment of sales tax], but I was cut off. And he would just never discuss taxes or anything like that. He said that was his department; he took care of that.

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It is unknown why taxable sales were the same as gross sales for the four latest quarters. There is no information in the record concerning what nontaxable sales consisted of in the 23 earlier quarters.

<sup>8</sup>Tax was paid for this quarter.

"Well, all I know is that anything that pertained to the financing of the business was my husband's job."

Edelgard Drew's testimony that she did not know sales tax had not been paid by the restaurant until the returns were submitted to her for signing in October of 1989 might seem improbable to someone who did not know the details of her life's travail. However, her deeply personal and emotional testimony gives credence to the finding that she was not aware of unpaid sales tax until such time.

Mrs. Drew was a teenager in Germany when, in 1943, her family lost everything:

"We were bombed and we were fleeing from one area to the other during the rage that went over Europe . . . ."

At 19, in Berlin, she met Warren Drew, with whom she came to the United States and subsequently married. Warren Drew also brought Mrs. Drew's sisters and brothers to the United States. Edelgard and Warren Drew raised a family of four children, including petitioner Clifford Drew and Warren John Drew, who was the chef of Hunters Horn Inn.

Mrs. Drew had little formal education, and as a native German speaker only learned English upon arrival in the United States. In 1955, her husband, Warren Drew, went into the restaurant business, and in 1959, Mrs. Drew started working as a hostess in restaurants operated by her husband. During the years at issue, she served as a hostess at Hunters Horn Inn and had no responsibility for financial matters. She had no authority to sign checks and had nothing to do with the preparation or filing of tax returns. Warren Drew controlled all of the restaurant's assets and made all business decisions of any significance.

Mrs. Drew's life at the restaurant, as it was in the home, was controlled by her husband, on whom she was dependent as well as subservient. Mrs. Drew testified:

"If I would have ever questioned anything, I was told that he has everything under control and it's none of my business or more or less not to concern myself with it, that he takes care of the financial part of the business.

"Or he would, if I ever would question him about monies or so on about the business, he would tell me, well, as I said before, that he is in charge of it.

"I had a very poor -- no communication with my husband as far as the business is concerned. I did what he asked me to.

"And that's how I was brought up in Europe, you know. This is how it is in Europe. You more or less do what your husband tells you to. And I trusted that he, you know, did what is right."

In 1983, Warren Drew and Edelgard Drew purchased the restaurant property for \$125,000.00 from Fieldstone Inn, Inc. The purchase agreement described the buyers as "Warren Drew and Edelgard Drew, his wife." The Division introduced into evidence, as part of its Exhibit "G", a photocopy of an "Addendum to Purchase Agreement" which was signed by Warren Drew and Edelgard Drew. Mrs. Drew did not deny signing this document, but she explained:

"I remember going, being at the lawyer's office and having to sign all sorts of paper, papers. I don't know really what I signed, or what in particular I signed. I just signed on the dotted line where I was told to sign."

In short, Edelgard Drew signed documents as directed by her husband.

The record does not disclose whether Warren Drew and Edelgard Drew ever executed a partnership agreement. On cross-examination, Mrs. Drew testified as follows with regard to her status as a "partner":

Attorney Glass: "Am I correct, Mrs. Drew, that you did testify earlier<sup>9</sup> that you knew you were a partner?"

Edelgard Drew: "I was told I was a partner; yes. My name was on the liquor license."

Attorney Glass: "Right."

Edelgard Drew: "But I really didn't understand the full meaning of being a partner."

Mrs. Drew described her role in the business as follows:

"[I]t was mainly greeting the people and checking on things, that the customers were satisfied, taking reservations; and that's about what it amounted to. Laying out the dining room for reservations, you know; setting up tables and so on."

Mrs. Drew testified that she "was not on a salary until much later", although exactly when she

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A careful review of Mrs. Drew's testimony establishes that she did not testify earlier that she "knew" she was a partner. She testified (at page 79 of the hearing transcript) that her husband ran his first restaurant as a partnership with his brothers. She also testified (at page 95 of the transcript) that she signed what she was told to sign and did not know whether she signed a document making her a partner with her husband to run Hunters Horn Inn.

began to receive a salary and how much was not established. Nonetheless, it appears that for most of the period at issue Mrs. Drew depended on her husband to "give me some money at times if I needed some."

In mid-1984 petitioner Clifford Drew began to work at Hunters Horn Inn. His weekly salary ranged from \$240.00 to approximately \$270.00 during the period at issue. Although he had authority to sign checks on behalf of the restaurant, his father, Warren Drew, directed and controlled what checks he would sign.

The Division introduced into evidence as its Exhibit "J" a photocopy of a Tax Compliance Division log made by Edward Brehm. On this log, Mr. Brehm noted that, at a conciliation conference on November 21, 1991, Clifford Drew "stated he was the 'general manager', handled all the suppliers, employees and in general ran the business." At the hearing, however, Clifford Drew characterized his duties as basically that of a *matre d'* while his father was alive. On cross-examination, Mr. Brehm conceded that it was possible that Clifford Drew had "been referring to running the business after his father's death when he returned." Clifford Drew had been hospitalized after a car accident in April of 1989, and returned to the restaurant in September of 1989.

Warren Drew had sole control over the restaurant's receipts. Tuesday Ann Fuoco described the restaurant's cash "management" as follows:

"During working hours it [cash] was behind the bar . . . . And when the restaurant closed, either Warren, Sr. or myself would ring the register out, put all the money in a money bag, and then Warren would take it from there."

Petitioners introduced much evidence concerning Warren Drew's alcoholism and excessive consumption of alcoholic beverages as well as his verbal abuse of family and employees. In Tuesday Ann Fuoco's words, everyone "walked on eggshells" around him. Warren Drew's daughter-in-law, Deborah Drew, described him similarly:

"[H]e was very adamant about, that he didn't have to answer to any of us. And he was his own man and he was in charge of what was going on in his own business."

According to Edelgard Drew, her husband "did things his way, which was his way and only his

way. And no one knew what really that was, other than what we could observe." Clifford Drew was protective of his mother, Edelgard Drew, and one reason he continued to work at the restaurant was to provide support and comfort to his mother.

***OPINION***

Tax Law § 1131(1) defines "persons required to collect [sales] tax" as follows:

"[e]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also 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."<sup>10</sup>

Tax Law § 1133(a) makes "every person required to collect any tax" personally liable for sales tax required to be collected.

The crux of the matter on this exception is whether petitioner, Edelgard Drew, was a partner with her husband in the operation of the restaurant.<sup>11</sup>

The Administrative Law Judge found that:

"the record does not establish that [she] was her husband's partner in a partnership that operated Hunters Horn Inn. Consequently, the Division's attempt to impose personal liability on Edelgard Drew, regardless of her actual duties and responsibilities, merely because she was a partner in a business that operated a restaurant, must fail (cf., Matter of Hopper, Tax Appeals Tribunal, July 29, 1993 [wherein the Tribunal decided in a withholding tax case that the partnership must first be found liable under the penalty statute before an individual partner may be held liable])" (Determination, conclusion of law "F").

However, he did find her liable for tax penalties and interest for the sales tax quarters ending August 31, 1989 and November 30, 1989 since:

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Laws of 1985 (ch 65, § 77, effective September 1, 1985) inserted ", director" and ", any employee of a partnership or any employee of an individual proprietorship", substituted a comma for "or" following "as such officer", inserted ", partnership or individual proprietorship", and inserted a semi-colon following "of this article".

<sup>11</sup>The Division's exception involves only that portion of the Administrative Law Judge's determination concerning Edelgard Drew.

"[a]fter her husband's death . . . [she] signed sales tax returns on behalf of the restaurant and, in effect, assumed responsibility for taxes that should have been collected and remitted after her husband's death. Furthermore, [petitioner] offered no proof that the failure to file and pay sales tax on a timely basis for such two periods was due to reasonable cause and not due to willful neglect [cite omitted]" (Determination, conclusion of law "F").

The following passage from the Division's exception captures the essence of its position:

"A review of the record below discloses that Edelgard Drew was a partner in operating Hunter's Horn Inn. She purchased the restaurant with her husband, Warren. The license from the State Liquor Authority was in both names. After her husband's death, she signed 27 sales tax returns, and on every return the title under her signature was partner. Her acts thus demonstrate that she held herself out as a partner. At the very least, she would be a partner by estoppel, as defined in Partnership Law, section 27, who by her conduct such as signing the return held herself out as a partner and therefore became liable for the partnership's liabilities to the Division of Taxation.

"The Administrative Law Judge correctly noted in Finding of Fact 9 that 'the record does not disclose whether Warren Drew and Edelgard Drew ever executed a partnership agreement.' However, he used this fact to misplace the burden of proof. The Division of Taxation is not charged with the task of proving a partnership. The petitioner, however, has the burden of showing she was not a partner. The best that can be said, from the testimony and evidence produced by petitioner, is that she did not understand the full meaning of being a partner. There was never a denial of the existence of a partnership, or evidence produced to support that position.

"It is therefore held that Edelgard Drew was a partner, in Hunter's Horn Inn, and as such is liable for the sales taxes asserted on the Notices of Determination. There was no proof offered that the failure to file and pay sales tax on a timely basis was due to reasonable cause, and therefore the statutory interest and penalty are sustained" (Division's exception, insert, pp. 3-4).

In response, petitioner argues that she was not a partner with her husband in the operation of the restaurant. Citing Brodsky v. Stadlen (138 AD2d 662, 526 NYS2d 478) and Ramirez v. Goldberg (82 AD2d 850, 439 NYS2d 959), petitioner urges that, in the absence of a written partnership agreement, other factors are relevant in considering whether a partnership exists, namely: 1) intention of the parties; 2) sharing of losses, 3) ownership of partnership assets, 4) joint management and control, 5) joint liability to creditors, 6) sharing of profits, 7) compensation, 8) contribution of capital, and 9) loans to the organization. Petitioner asserts that she never intended to be a partner; that she had no authority or responsibility for the

management of the restaurant and that she did not contribute capital to the business nor share in its profits. Petitioner rejects the Division's argument that the documentary evidence alone is sufficient to prove that a partnership exists by estoppel since there is no evidence of reliance by the Division on any of petitioner's actions or the documents that she signed. Petitioner asserts that we should give deference to the Administrative Law Judge's determination since he had the opportunity to review the documentary evidence and "the opportunity to observe [petitioner] and otherwise make judgments as to her credibility and the credibility of other witnesses" (Petitioner's brief, p. 5).

We affirm the determination of the Administrative Law Judge that petitioner was not a partner with her husband in the operation of the restaurant.

Briefly, "[a] partnership has been defined as a contract of two or more persons to place their money, effects, labor or skill, or some or all of them, in lawful business, and to divide the profits and bear the losses in certain proportions" (Lee v. Slovak, 81 AD2d 98, 440 NYS2d 358, 360).

Whether a partnership exists is a question of fact -- and no one characteristic of a business relationship is determinative in finding the existence of a partnership (Brodsky v. Stadlen, supra). Case law indicates that in the absence of a contractual arrangement, the partnership may be proved by testimony as to conversations or by circumstantial evidence. Whether one is a partner turns on several factors including sharing in the profits and losses and exercising joint control of the business (Alleva v. Alleva Dairy, 129 AD2d 663, 514 NYS2d 422; Scharf v. Crosby, 120 AD2d 971, 502 NYS2d 891).

Here, the Administrative Law Judge weighed the probative force of the documentary evidence, the testimony of the witnesses and the relative strength of the inferences that may be drawn from each and made a determination that the record does not support a finding that the business was operated as a partnership. We find no basis to disturb his conclusion. There is no evidence of a written partnership agreement. Contrary to the Division's assertion, the documentary evidence relied upon by the Division, i.e., the purchase agreement, the liquor

license and the catering permit, which, on its face, may indicate part ownership, does not, in and of itself, compel a conclusion that a partnership existed (Partnership Law § 11[2]).<sup>12</sup> The testimony of petitioner that she was "told" she was a partner and that she "really didn't understand the full meaning of being a partner" is not evidence of the mutuality of intent and purpose among and between partners which is essential to the creation of a partnership arrangement with its concomitant joint management and control ( Brodsky v. Stadlen, supra; Scharf v. Crosby, supra). In fact, there is no evidence to controvert petitioner's characterization of her role in the business, i.e., that she functioned as a hostess at the restaurant and did not perform any meaningful role in the management of the business, an essential element of a partnership (Scharf v. Crosby, supra). Nor is there any evidence that petitioner shared in the profits of the partnership, only that after a period of time she began to receive a salary (Scharf v. Crosby, supra).

Finally, we agree with petitioner and reject the Division's assertion that there is partnership by estoppel since there is no evidence that the Division, in any way, relied upon petitioner's actions or the documents signed by petitioner (Partnership Law, § 27).

Accordingly, it is ORDERED, ADJUDGED and DENIED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Edelgard Drew is granted to the extent indicated in conclusion of law "F" of the Administrative Law Judge's determination, but in all other respects is denied; and

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<sup>12</sup>Section 11[2] of the Partnership Law provides:

"2. Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property."

4. All notices of determination, dated February 1, 1991, issued to petitioner Edlegard Drew are cancelled except for notice numbers S910201768E and S910201769E for sales tax quarters ending August 31, 1989 and November 30, 1989, which notices are sustained.

DATED: Troy, New York  
February 16, 1995

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

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