

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>TERRY STAFFORD, OFFICER OF LONG WHARF CORPORATION</b>	:	DECISION DTA No. 811207
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 September 1, 1988 through November 30, 1988.	:	

---

Petitioner Terry Stafford, Officer of Long Wharf Corporation, 26 Middle Drive, Huntington, New York 11743, filed an exception to the determination of the Administrative Law Judge issued on April 7, 1994. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Any reply brief by petitioner was due on December 7, 1994, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUES***

I. Whether a default determination should be issued against the Division of Taxation for its failure to file its answer within the time prescribed in the Rules of Practice and Procedure.

II. Whether petitioner has shown that all or part of the assessment at issue was paid by Long Wharf Corporation.

III. Whether the Division of Taxation properly assessed petitioner as a person responsible to collect tax on behalf of Long Wharf Corporation pursuant to Tax Law §§ 1131(1) and 1133(a).

***FINDINGS OF FACT***

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

On June 7, 1991 the Division of Taxation ("Division") issued to petitioner, Terry Stafford, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$11,404.48 in tax due, plus penalty and interest for the period September 1, 1988 through November 30, 1988. The notice stated that petitioner was liable "individually and as officer of Long Wharf Corp. under Sections 1131(1) and 1133 of the Tax Law."

Long Wharf Corporation operated a restaurant called Wings Point Restaurant located in East Hampton, New York. Long Wharf Corporation was formed in 1985 to own and operate Wings Point Restaurant. Petitioner was a 25% shareholder in the corporation. Two other individuals, William Long and Anita Long, husband and wife, owned the remaining 75% of the shares. Petitioner was president of the corporation. William Long was secretary-treasurer and Anita Long was vice president.

Petitioner was also employed by the corporation as the general manager of the restaurant. As general manager petitioner was responsible for the daily supervision of the restaurant's staff, which ranged from about 50 employees during the summer season to about 10 during the fall and winter. Petitioner also oversaw all supply orders, counted nightly proceeds, made bank deposits, paid creditors and served as maitre d'.

During the period of his employment at the restaurant, petitioner signed all tax returns, including sales tax returns, filed by the corporation. The sales tax returns were prepared by a part-time bookkeeper. Petitioner also had the check-signing authority. He signed all checks for payment of taxes, including sales taxes; he signed payroll checks; he signed checks for payment of creditors.

Petitioner signed a standard form financing statement (Form UCC-1) on behalf of the corporation for property and equipment used in the restaurant. Said financing statement was filed in the Suffolk County Clerk's office on September 14, 1988.

Petitioner's employment as general manager of the restaurant ceased as of October 28, 1988. His involvement in the day-to-day affairs of the restaurant ceased as of that date. Petitioner continued to hold the title of corporate president until July 20, 1989, when he signed a Stock Redemption Agreement pursuant to which he agreed to sell his stock back to Long Wharf Corporation. He further agreed, pursuant to this agreement, to resign as president of the corporation; to withdraw any personal guarantees related to the business; to surrender any claim to work for the business; to place his stock in escrow with delivery to the corporation upon full payment; and upon full payment, to release the corporation of any obligation to him. The Stock Redemption Agreement also provided that the corporation would hold petitioner harmless for any tax liability not to exceed \$30,000.00 assessed for the period prior to October 31, 1988, and to hold petitioner harmless for any amount of taxes due for any subsequent period.

Petitioner's departure from the restaurant was caused by the restaurant's financial difficulties and by his belief that his fellow shareholders were not living up to their informal agreement to loan the business sufficient funds to keep it operating. Petitioner's decision was also influenced by what he perceived as the restaurant's landlord's failure to give the corporation proper rental credits for improvements made by the corporation to the restaurant's premises. Petitioner's belief that the restaurant and he were being treated unfairly or inequitably was influenced by the fact that Mr. Long was a shareholder of the entity which acted as the restaurant's landlord.

The sales taxes at issue were not paid because of the corporation's financial difficulties. Such difficulties also caused petitioner to refrain from cashing his own weekly paycheck for the final six weeks of his employment. Both the decision not to pay sales tax and not to cash his weekly paychecks were made to enable the restaurant to continue operating.

At the time of the formation of the corporation, petitioner loaned the corporation approximately \$50,000.00. According to petitioner, William and Anita Long agreed at that time

to loan the corporation sufficient funds to keep the restaurant operating since the corporate officers believed that the restaurant would operate at a loss for a period of time.

Petitioner ultimately loaned the corporation about \$72,000.00. Additionally, petitioner personally guaranteed loans made by financial institutions to the corporation.

For the sales tax period at issue, the corporation filed part-quarterly returns for the months of September and October 1988, and a quarterly return for the quarter ended November 30, 1988. Said returns were dated October 19, 1988, November 18, 1988, and December 19, 1988, respectively. Said returns were filed without payment and indicated a total of \$11,404.48 in sales tax due for the quarter.<sup>1</sup> There is no evidence in the record of the filing dates of these returns.

Petitioner's purported signature appears on all three returns filed by the corporation for the period at issue. Petitioner denied that any of the signatures appearing on the three returns were his.

Petitioner submitted into evidence a letter dated June 28, 1992, from a Patricia Siegel, identified as a "handwriting examiner". The letter was written on the letterhead of "Patricia Siegel Enterprises, Inc. Handwriting Examination"<sup>2</sup> and stated, as follows:

"At this time I am able to give a preliminary opinion on two of three signatures presented for examination.

"My preliminary opinion is that the questioned Terry Stafford signatures on Sales and Use Tax Return forms dated 10/19/88 and 12/19/88 are not his genuine signatures. This opinion is conditional based on seeing the original documents for confirmation of findings.

"I have not yet come to a conclusion regarding the third questioned signature on another tax form dated 11/18/88. I will need to see the original document to make even a preliminary determination in this instance. Several letter forms are not clearly decipherable on the photocopy available for examination.

---

<sup>1</sup>The September part-quarterly return reported \$7,632.51 in tax due. The October part-quarterly reported \$4,492.00 in tax due. Since the quarterly return indicated \$11,404.48, it is determined that \$279.97 in sales tax liability accrued during November 1988.

<sup>2</sup>Petitioner had hired a private investigation service in an effort to establish that the disputed signatures were not his. The private investigator had, in turn, hired Patricia Siegel Enterprises, Inc.

"I will also require additional known standards of Terry Stafford's writing and signatures to complete the evaluation of the 11/18/88 questioned signature as it differs somewhat from the other two questioned signatures."

No evidence regarding Ms. Siegel's qualifications to render opinions on the genuineness of signatures is contained in the record.

Based upon a review of the disputed signatures and of the many concededly genuine examples of petitioner's signature contained in the record, it is concluded that the signatures on the September part-quarterly return dated October 19, 1988 and the quarterly return dated December 19, 1988 are clearly not that of petitioner. A review of the signature on the October part-quarterly return dated November 18, 1988 is inconclusive. It is noted that the Patricia Siegel letter is given little weight in reaching this conclusion since the record contains no evidence regarding Ms. Siegel's qualifications as a handwriting expert.

The Division of Tax Appeals acknowledged receipt of the petition in this matter by letter dated October 7, 1992. The Division's answer was dated December 14, 1992 and was filed on or about that date.

At hearing petitioner raised the question of whether the corporation had, at some point, paid all or part of the assessment at issue. In response, the Division introduced a printout of its assessment receivable record for the corporation for the period at issue. This record indicated an outstanding sales tax liability of \$11,404.48, plus penalty and interest, for the relevant period.

#### ***OPINION***

The Administrative Law Judge denied petitioner's motion for a determination on default against the Division for late filing its answer. The Administrative Law Judge first determined that petitioner's motion was untimely as it was not made within 90 days after the service of the answer. In addition, the Administrative Law Judge noted that even if petitioner's motion had been timely, no prejudice has been shown to petitioner or alleged by petitioner and, therefore, the motion was properly denied.

The Administrative Law Judge next found that the record introduced by the Division showed that no payments were made by the corporation against the outstanding sales tax liability, and that petitioner had presented no evidence to the contrary. The Administrative Law Judge, therefore, concluded that no such payments were made by the corporation.

The Administrative Law Judge then addressed the question of whether petitioner had sufficient authority and control over the affairs of the corporation to be considered a responsible officer. The Administrative Law Judge found that petitioner was a responsible officer of the corporation. Specifically, the Administrative Law Judge found that:

"petitioner was the general manager of the restaurant, fully involved in and in charge of its day-to-day operations. He had check-signing authority and generally oversaw the payment of creditors. Whether he signed the returns for the period at issue or not . . . he generally did sign sales tax returns (and other tax returns) on behalf of the corporation. He also signed checks in payment of sales taxes. Petitioner was also president of the corporation, owned 25% of its stock, had loaned the corporation approximately \$72,000.00 and had provided personal guaranties on corporate loans" (Determination, conclusion of law "F").

The Administrative Law Judge then concluded that when petitioner's employment as the general manager of the restaurant ended on October 28, 1988, petitioner was no longer a responsible officer of the corporation. With respect to the period prior to October 28, 1988, the Administrative Law Judge found that petitioner did have the authority to act on behalf of the corporation and was not prevented from doing so by the other shareholders. The Administrative Law Judge next found that while the corporation was experiencing economic difficulties, these difficulties did not excuse petitioner from his responsibility to collect and remit tax on behalf of the corporation (see, Matter of Dworkin Constr. Co., Tax Appeals Tribunal, August 4, 1988).

With respect to the two returns for this period that petitioner did not sign, the Administrative Law Judge stated that: "whether petitioner actually signed the returns is not dispositive of the issue of responsible officer status, but is merely one factor to be considered . . .

the record clearly shows that [petitioner] was a responsible officer of the corporation until October 28, 1988" (Determination, conclusion of law "H").

On exception, petitioner continues to argue that it was prejudicial for the Administrative Law Judge to accept the Division's late filed answer but to deny his motion to default the Division because his motion was not timely filed.

In addition, petitioner continues to argue that the Division has not submitted any proof that the taxes in question were not paid by the corporation at a later date.

Petitioner also argues that he was not a responsible officer of the corporation relying on his uncashed paychecks as proof that he did not have the authority to cash them. Petitioner further argues that a review of the sales tax payment record of the restaurant will show who was in control of the restaurant from September 1988 through November 1988. Petitioner asserts that when he was the operator/manager of the restaurant all tax obligations were met and, if he had been in control of the restaurant from September 1988 through November 1988, the taxes for that period would also have been paid. Petitioner states that only when the 75% shareholders took control over the restaurant did the payments stop.

In response, the Division argues that petitioner has not shown that he was prejudiced by the answer being 10 days late and absent such prejudice petitioner cannot be granted the relief sought.

The Division further argues that the burden of proof is on petitioner to show that the tax was paid by the corporation and petitioner has not submitted any evidence of payment. The Division states that the Accounts Receivable System printout (Exhibit "K") shows that no payment was made by the corporation.

The Division also argues that the failure of petitioner to cash his last six paychecks only shows that he decided to pay other creditors rather than himself.

Finally, with respect to the fact found by the Administrative Law Judge that petitioner did not sign two of the three returns at issue here, the Division argues that:

"[a]ssuming petitioner did not authorize others to sign his name to the returns, the point remains that he shared responsibility with the other officers of the corporation to insure that the taxes were properly remitted. Petitioner's failure to fulfill this responsibility does not relieve him from liability for tax due" (Division's letter, p. 2).

The Administrative Law Judge correctly and adequately addressed all of the issues raised before him and we find no basis in the record before us for modifying the Administrative Law Judge's determination on these issues in any respect. Therefore, we affirm the determination of the Administrative Law Judge on these issues for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Terry Stafford, Officer of Long Wharf Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Terry Stafford, Officer of Long Wharf Corporation is granted to the extent indicated in conclusion of law "G" of the Administrative Law Judge's determination, but is otherwise denied; and
4. The Division of Taxation is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 7, 1991 in accordance with paragraph "3" above, but such Notice is otherwise sustained.

DATED: Troy, New York  
May 11, 1995

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

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