STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN P. BARTOLOMEI, OFFICER OF WINTERGARDEN INN ASSOCIATES	:	DETERMINATION DTA NO. 812888
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, 1991 through August 31, 1991.	:	

Petitioner, John P. Bartolomei, officer of Wintergarden Inn Associates, 335 Buffalo Avenue, Buffalo, New York 14303, 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 June 1, 1991 through August 31, 1991.

On May 1, 1995 and May 12, 1995, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by Steven U. Teitelbaum Esq. (Andrew S. Haber, Esq., of counsel) consented to have the controversy determined on submission without hearing. On June 21, 1995 the Division of Taxation submitted documentary evidence. Pursuant to a schedule set by the Administrative Law Judge, petitioner had until July 21, 1995 to submit documentary evidence and/or a brief, but did not do so. The Division of Taxation submitted its brief on August 22, 1995. Petitioner had until September 8, 1995 to submit a reply brief, but did not do so. Accordingly, the six-month period for the issuance of this determination began on September 8, 1995. After due consideration of the record, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly assesssed petitioner as a person responsible to collect tax under Tax Law § 1131(1) and § 1133(a) on behalf of Wintergarden Inn Associates.

FINDINGS OF FACT

1. On June 1, 1993 the Division of Taxation ("Division") issued to petitioner, John P. Bartolomei, a Notice of Estimated Determination which assessed $65,477.18 in additional sales and use tax due, plus penalty and interest, for the period June 1, 1991 through August 31, 1991. The notice further advised petitioner that he was being assessed as an "Officer/ Responsible Person" of Wintergarden Inn Associates.

2. The assessment against petitioner was subsequently reduced to $30,604.07, plus penalty and interest, pursuant to a Conciliation Order dated March 11, 1994. Said reduced amount represents the amount reported, but not paid, by Wintergarden Inn Associates on its sales tax returns filed with respect to the period at issue herein.

3. Wintergarden Inn Associates ("Wintergarden") was a limited partnership that did business as and operated a hotel known as the Inn at the Falls located in Niagara Falls, New York. At the time in question, National Urban Ventures, Inc. was general partner in Wintergarden. The general partner held a 50% ownership interest in the partnership. The remaining 50% ownership interest in Wintergarden was held by four limited partners, one of whom was petitioner. Petitioner became a limited partner pursuant to the "Second Amendment to the Limited Partnership Agreement", dated April 9, 1986. Petitioner owned 30% of the limited partnership share, equivalent to a 15% ownership interest in Wintergarden. The largest limited partnership share, which amounted to 42%, was held by one Edward U. Bevilacqua.

4. Additionally, as of April 1986 petitioner was a 30% shareholder in National Urban Ventures, Inc., the general partner of Wintergarden. Prior to that time, Edward U. Bevilacqua was the sole shareholder of National Urban Ventures, Inc. and its predecessors. As of April 1986, Mr. Bevilacqua's stock interest in the corporate general partner declined to 67%.

5. The Inn at the Falls maintained payroll, operating, and money market bank accounts. Petitioner was an authorized signatory on each. Copies of the bank corporate signature cards for each account, dated June 21, 1989, August 30, 1989, and March 12, 1990, respectively, were

submitted into evidence herein. Petitioner is listed as the president of the Inn at the Falls on each card.

6. Petitioner was also vice-president of National Urban Ventures, Inc. As vice-president, petitioner executed a Certificate of Assumed Name, dated August 1, 1987, on behalf of National Urban Ventures, Inc. Petitioner also executed a State Liquor Authority Application for Caterer's Permit, dated September 6, 1988, on behalf of Wintergarden as vice-president of National Urban Ventures, Inc.

7. The Limited Partnership Agreement under which Wintergarden Inn Associates operated vested the general partner with exclusive authority to manage and control the business affairs of the partnership. The Limited Partnership Agreement explicitly excluded limited partners from participation in the management and control of the partnership's business, from transacting any business on behalf of the partnership, and from acting for or binding the partnership.

8. Petitioner is an attorney. At the time petitioner became a limited partner in Wintergarden he practiced law with one John J. Del Monte, Esq., under the firm name Bartolomei & Del Monte, P.C. Mr. Del Monte was also a limited partner in Wintergarden and a shareholder in National Urban Ventures,Inc., although his ownership interest in the hotel operation was much smaller than that of petitioner. Bartolomei & Del Monte, P.C. contributed $425,000.00 to the partnership.

9. Petitioner was previously assessed by a notice of determination as a responsible officer of Wintergarden Inn Associates with respect to a claimed sales and use tax liability for the period December 1, 1987 through August 31, 1990. Following a conciliation conference, this assessment was cancelled pursuant to a Consent dated May 12, 1992. There is no evidence in the record regarding the basis for this cancellation.

10. In October 1991 Wintergarden Inn Associates went into receivership. The receiver was appointed by an Order of the State Supreme Court pursuant to an action filed by the trustee of certain creditors of the enterprise. Among others, Wintergarden Inn Associates, National

Urban Ventures, Inc. and Edward U. Bevilacqua were specifically named as defendants in said action. Petitioner was not named as a defendant in the proceeding. The trustee made a payment of $36,900.00 to the Commissioner of Taxation by check dated March 3, 1994. The record herein contains a copy of a transmittal letter dated March 16, 1994 from the trustee's attorney to the Division of Taxation indicating that the check was enclosed therein. The letter further refers to a bankruptcy proceeding involving Wintergarden and notes that the $36,900.00 was being forwarded in full satisfaction of the Commissioner's claims against Wintergarden's bankrupt estate. The record contains no other information regarding the taxes which were purportedly the subject of the Commissioner's claim against Wintergarden's bankrupt estate, such as the specific tax or taxes and periods involved. Indeed, other than the comments made in the transmittal letter dated March 16, 1994 from the trustee's attorney, the record contains no information regarding the Wintergarden bankruptcy case.

11. Wintergarden's sales tax liability for the month of March 1991 was paid by a check dated April 22, 1991 in the amount of $4,802.91 drawn on the escrow account of Bartolomei & Grenga, P.C. The check does not bear petitioner's signature.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for sales and use tax imposed, collected, or required to be collected under Article 28 of the Tax Law upon "persons required to collect tax". During the period at issue, Tax Law § 1131(former[1]) defined such "persons" as including :

> "[A]ny 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. Among several theories of liability, the Division asserts that petitioner was properly assessed as a person responsible to collect tax for Wintergarden because of his relationship with National Urban Ventures, Inc. As general partner in Wintergarden, National Urban Ventures, Inc. was, by definition, a person required to collect tax for Wintergarden under Tax Law

§ 1131(1) (see, Matter of Martin, State Tax Commn., August 12, 1987). As plainly stated in the statute, the term "person required to collect tax" also includes corporate officers who are under a duty to act for the corporation in complying with any requirements of Article 28. Accordingly, corporate officers under a duty to act for a corporate partner are likewise persons required to collect tax within the meaning of Tax Law § 1131(1) (see, Matter of Hammerman, Tax Appeals Tribunal, August 17, 1995).

C. Pursuant to the foregoing rationale, petitioner's liability in this matter turns on whether he was under a duty to act for National Urban Ventures, Inc. in complying with any requirement of Article 28. It is a settled matter that the holding of corporate office does not result in the per se tax liability of an officeholder (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427). Rather, finding a person to be an individual responsible for collecting and paying over sales and use taxes must turn on the particular facts of each case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564). "The 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" (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Factors to consider in determining responsibility include:

> "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 interests in the corporation [citations omitted]" (Matter of Constantino, supra).

D. Before applying these legal principles to the facts herein it is particularly important in this case to note that a presumption of correctness attaches to a notice of determination upon its issuance (see, Matter of Hammerman, supra), and that the burden of proof to overcome a sales tax assessment thus rests with the taxpayer (see, Allied New York Services v. Tully, 83 AD2d 727, 442 NYS2d 624).

E. A review of the record in this matter compels the conclusion that petitioner has failed to rebut this presumption and has thereby failed to overcome his burden of proof to show that he

was not under a duty to act for National Urban Ventures, Inc. within the meaning of Tax Law § 1131(1). It is concluded, therefore, that the Division's assertion of personal liability against petitioner for sales tax owed by Wintergarden Inn Associates under Tax Law § 1133(a) was proper.

Specifically, the record in this matter shows that petitioner was vice-president and owned 30% of the stock of National Urban Ventures, Inc. As vice-president, petitioner signed a State Liquor Authority document and a Certificate of Assumed Name (see, Finding of Fact "6"). Additionally, petitioner was president of Wintergarden, the partnership in which National Urban Ventures, Inc. held a 50% ownership interest. As president of Wintergarden petitioner was an authorized signatory on the partnership's bank accounts. Also, petitioner, through his law firm, invested significantly in the corporation's business enterprise, Wintergarden (see, Finding of Fact "8").

While these facts do not constitute overwhelming evidence of responsible officer status, petitioner's case consists, for the most part, of conclusory allegations set forth in his petition as to his lack of knowledge and control over the affairs of Wintergarden. Specifically, petitioner alleged that he was not employed by Wintergarden, that he was not involved in the day-to-day operations of Wintergarden, that he did not make decisions to spend money, and that he did not have any knowledge of any tax due during the periods involved. Petitioner also alleged in his petition that he did not sign checks for Wintergarden and that his name was on signature cards in his capacity as an attorney and only in the event of an emergency would he sign for Wintergarden. Petitioner's allegations are certainly plausible. They are not evidence, however, and petitioner declined to present any affidavit from either himself or any other individual with knowledge of the operation of Wintergarden or National Urban Associates to prove these assertions. Clearly, petitioner's unsupported allegations are outweighed by the evidence in the record, outlined above, indicating that petitioner was a responsible officer of National Urban Associates, Inc. and is therefore liable for the tax assessed herein.

E. Petitioner did establish that he had been assessed previously as a responsible officer of Wintergarden and that such assessment was cancelled pursuant to a Consent dated May 12, 1992 (see, Finding of Fact "9"). This fact, however, provides no support to petitioner's position in the instant matter. Even assuming, however dubiously, that the Consent may be considered precedent herein (see Tax Law § 170[3-a][f]), there simply is no evidence in the record regarding the basis for the cancellation of the prior assessment. It may well be that the prior assessment was cancelled for reasons unrelated to petitioner's status as a responsible officer of Wintergarden (e.g., payment of the tax by either Wintergarden or another responsible officer).

F. Petitioner also asserted that the tax at issue has been paid. In support of this contention petitioner pointed to the March 16, 1994 letter from the Trustee's attorney (see, Finding of Fact "10"). This assertion must be rejected, for there is no evidence in the record to show that the amount purportedly paid by the trustee's attorney was for sales tax due and even if it was there is no evidence in the record to show that such amount was paid in respect of the period at issue herein.

G. Alternatively, it is noted that petitioner contends that he was a limited partner of Wintergarden, and that as such he may not be held personally liable for the sales tax obligations of the partnership. Assuming for a moment that a limited partner is not per se liable under Tax Law § 1131(1) (see, Conclusion of Law "H"), it is well-established that a limited partner loses the protection of limited liability where that person takes part in the control of the business (see, Partnership Law § 96). Additionally, where a person is both a limited partner and an officer, director and/or shareholder of a corporate general partner then that person must prove that any relevant actions taken were performed solely in the capacity of officer, director and/or shareholder of the general partner (see, Gonzalez v. Chalpin, 77 NY2d 74, 77, 564 NYS2d 702, 703). In this case, while the partnership agreement names petitioner as a limited partner and specifically excludes limited partners from the management and control of the business, this evidence is outweighed by evidence showing that petitioner was actively involved in the management of Wintergarden. Such active involvement has been outlined above in Conclusion

of Law "D". Most significantly, petitioner was president of Wintergarden. There is no evidence that petitioner acted as president of Wintergarden in his capacity as an officer and shareholder of National Urban Ventures, Inc. Petitioner was therefore generally liable for obligations of the partnership (id.), and the Division's assertion of personal liability against petitioner pursuant to Tax Law § 1131(1) for the sales tax obligations of Wintergarden was therefore proper.

H. The Division also asserted that petitioner, as a limited partner of Wintergarden, was, by definition, a person required to collect tax under Tax Law § 1131(1). As discussed above, the record indicates that, as a result of his involvement in the management of Wintergarden, petitioner was not entitled to the limited liability protection generally afforded a limited partner. Accordingly, discussion of this theory of liability assumes that petitioner was a bona fide limited partner in Wintergarden.

Section 1131(1) of the Tax Law does impose per se liability on "any member of a partnership" regardless of the partner's involvement in the operation and management of the business (see, Matter of Martin, State Tax Commn., August 12, 1987). There does not appear to be any case law directly addressing the issue of whether a limited partner is, by definition, a person required to collect tax under Tax Law § 1131(1). Moreover, petitioner offered no argument to counter the Division's contention. The statute does not make any distinction between general and limited partners. Since a limited partner is a member of a partnership, albeit one with limited liability protection, it follows that a limited partner falls within the meaning of "any member of a partnership" as used in Tax Law § 1131(1).

This interpretation is supported by the recent amendment to Tax Law § 1131(1) which broadened the definition of persons responsible to collect tax to include any member of a limited liability company (LLC) irrespective of such member's involvement in the LLC's operations or management (see, L 1994, ch 576). Since members of LLC's enjoy limited liability protection similar to limited partners, and since, depending upon the particular circumstances, such a member may have no involvement in management, it follows that the inclusion of such members within the definition of responsible persons is indicative of a

legislative intent to similarly include limited partners within the definition of responsible persons (see, Limited Liability Company Law §§ 102, 401-420, 601-611).

I. The petition of John P. Bartolomei is denied and the Notice of Estimated Determination, dated June 1, 1993, as modified by the Conciliation Order, dated March 11, 1994 is sustained.

DATED: Troy, New York
February 15, 1996

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE