STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JENNIFER VALLONE	:	DETERMINATION DTA NO. 818357
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, 1998 through August 31, 1998.	:	

Petitioner, Jennifer Vallone, 21467 Chipmunk Lane, Boca Raton, Florida 33427, 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, 1998 through August 31, 1998.

On October 16, 2001 and October 23, 2001, respectively, petitioner, appearing by Leon C. Baker, Esq., and the Division of Taxation, appearing by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel), consented to have the matter determined on submission without a hearing. All documentary evidence and briefs were submitted by March 13, 2002, which date began the six-month period for issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner was personally liable for sales tax due on behalf of 1880 House, Inc. as a person required to collect and pay tax under Tax Law §§ 1131 and 1133.

II. Whether the assessment of sales and use taxes lacks a rational basis.

III. Whether petitioner has shown reasonable cause for abatement of penalties assessed.

FINDINGS OF FACT

1. On September 28, 2000, the Division of Taxation ("Division") issued a Notice of Determination (Notice No. L-018573246) to petitioner, Jennifer Vallone, for sales and use taxes due for the period June 1, 1998 through August 31, 1998 in the amount of $6,118.80, interest due of $1,679.89 and penalty due of $1,835.48, for a total amount due of $9,634.17. The notice stated that petitioner was personally liable as an officer or responsible person of 1880 House, Inc. ("1880 House" or "the corporation") under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

The amount of tax due was based upon the sales tax return for the period June 1, 1998 through August 31, 1998 as filed by the corporation on September 20, 1998 without full payment of the tax reported to be due thereon.

2. The corporation operated a restaurant called Jenny's Restaurant located at 755 Montauk Highway, in Water Mill, New York. 1880 House was incorporated on August 26, 1996 to operate Jenny's Restaurant.

3. Petitioner, as owner/manager of the corporation, prepared and signed sales tax returns reporting zero sales for the periods June 1, 1997 through August 31, 1997 and December 1, 1997 through February 28, 1998.

4. On behalf of 1880 House, petitioner, as manager, signed an Election by a Federal S Corporation to be Treated as a New York State S Corporation (Form CT-6) dated March 10, 1998. This Form CT-6 indicates that Jennifer Vallone and Diego Vallone each own 50 shares of 1880 House stock acquired on August 26, 1996.

5. On May 28, 1998, petitioner, as president of 1880 House, signed the corporation's 1997 Form CT-3, General Business Corporation Franchise Tax Return, the corporation's 1997 Form

CT-3M/4M, General Business Corporation MTA Surcharge Return, and a Request for Six-Month Extension to File (For Franchise/Business Taxes, MTA Surcharge, or Both) (Form CT-5). Those corporation franchise tax returns were prepared by a paid professional tax preparer.

6. Petitioner acted as general manager of the restaurant which opened sometime in April 1998.[1] The restaurant generated gross and taxable sales of $66,883.00 during the months of April and May 1998. For the period March 1, 1998 through May 31, 1998, sales tax in the amount of $5,477.72 was reported on the sales tax return prepared by an outside preparer. Petitioner, as owner/manager, signed the sales tax return for that period. She also prepared and signed the check sent in payment of sales tax due for that period. The check, dated June 20, 1998, payable to the "N. Y. S. Sales Tax Bureau" in the amount of $5,477.72, was drawn on the corporation's checking account with the North Fork Bank.

7. On August 17, 1998, the restaurant closed and its employees were discharged without notice.

8. As noted above, on September 20, 1998, the corporation filed a sales and use tax return, for the period June 1, 1998 through August 31, 1998, reporting tax due of $14,118.80, with remittance of $8,000.00. The $8,000.00 payment was made using a Washington Mutual Bank, FA bank check, dated September 17, 1998, on which petitioner was listed as the remitter.[2]

9. On April 10, 2000, a final amended sales and use tax return for the period June 1, 1998 through August 31, 1998 reporting taxable sales in the amount of $171,137.00 and tax due in the amount of $14,118.80 was submitted to the Division's Suffolk District Office Tax Compliance

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[1] The exact date on which the restaurant opened is not part of the record.

[2] The corporation's name has been handwritten directly beneath petitioner's typewritten name on the check.

Section. This return contains only the signature of the professional partnership that prepared the return.[3]

SUMMARY OF PETITIONER'S POSITION

10. Petitioner claims that she, a former manager in an unnamed corporation that operated a chain of restaurants, and her husband, a professional tennis instructor possessing skills in various construction trades, entered into a business agreement with Sari Posner and Matthew Cohen, wealthy owners of a run-down building in Water Mill, New York that they wanted to convert into a luxury restaurant. She contends that the unwritten agreement provided as follows. Ms. Posner and Mr. Cohen would supply all funds necessary for building renovations and the purchase of restaurant furniture, equipment and supplies. Mr. Vallone would renovate the building, doing what work he could, hiring and supervising contractors to do the rest. Mr. Vallone was to receive no compensation except for a 50% interest in 1880 House, Inc. Petitioner would purchase all furniture and equipment needed to operate a high quality restaurant. She would also hire and train the restaurant staff. Petitioner would receive no salary or other compensation until the restaurant was open and operating. Once the restaurant was operating, petitioner would be the general manager and she would receive the other 50% interest in the corporation. Neither petitioner nor her husband would have any ownership interest in the building. Ms. Posner and Mr. Cohen would recover their investment and a return on their investment from the unspecified rent they would receive from the corporation. Petitioner maintains that she and her husband fulfilled their obligations under the agreement and worked full time to set up the restaurant which opened sometime in April 1998. She contends that,

[3] Directly above the signature of the preparer, on the line labeled "Printed Name of Preparer if other than Taxpayer" appear the handwritten initials "MPS" and the date "9-18-98."

shortly before the restaurant opened, Ms. Posner informed petitioner and her husband that they would receive only a 49% interest in the corporation and that Ms. Posner would own the other 51% interest. She further contends that, at that time, Ms. Posner stated that she was now president of the corporation and petitioner would continue only as general manager and maitre d'.

Petitioner does not dispute that, until August 17, 1998, she was a person responsible for the collection of sales tax on behalf of the corporation. However, petitioner asserts that after August 17, 1998, she no longer was a responsible person. She argues that after she was discharged by her employer, the corporation, she could not cause the corporation to pay over the sales taxes. Petitioner claims that the corporation ceased doing business on August 17, 1998, when Ms. Posner and Mr. Cohen, as landlords, closed down the restaurant because they felt that it would be more advantageous for them to have a different restaurant business occupy the premises. She also claims that Ms. Posner and Mr. Cohen, as controlling shareholders, discharged her as general manager on August 17, 1998. According to petitioner, at that time, she estimated that the sales tax due would be $14,000.00 but the corporation had only about $8,000.00 in its checking accounts. Petitioner states that, on behalf of the corporation, she sent a bank check in the amount of $8,000.00 to the Division. She asserts that when the restaurant closed, the corporation was not insolvent because it had liquor and other inventory on hand the value of which was greater than the remaining amount of sales tax due. Petitioner avers that, prior to leaving, she arranged a sale of those assets but Ms. Posner and Mr. Cohen did not go through with that sale. Petitioner claims to be unaware of what Ms. Posner and Mr. Cohen did with those assets. She also claims to be unaware of what financial consideration, if any, the corporation received for its restaurant and kitchen fixtures which cost about $40,000.00 to

$50,000.00, that allegedly are in the possession of the new tenant. Petitioner further contends that Ms. Posner and Mr. Cohen demanded that she use corporation funds to pay property taxes and insurance on the Water Mill property owned by their corporation, Camino Gardens Limited, Corp. She maintains that those unspecified amounts that she paid at their behest were more than sufficient to satisfy the remaining sales taxes. Petitioner asserts that the penalties should be abated because she made every effort to ensure that the sales taxes due for the period in issue were timely paid.

11. Alternatively, petitioner asserts that the assessment of sales and use taxes lacks a rational basis. She argues that the Division failed to present any admissible evidence of the basis for the assessment. Petitioner points out that the Division submitted only the unsigned amended sales tax return for the period in issue, not the original return. She argues that the Division cannot rely on the unsigned sales tax return of the corporation because it is unverified hearsay. She further argues that, since there is no evidence of the corporation's liability, the Division cannot show that the corporation owes more than the $8,000.00 she caused the corporation to pay.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1132(a), sales tax "shall be paid to the person required to collect it, as trustee for and on account of the state."

B. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

C. The mere holding of corporate office does not, per se, impose tax liability upon an office holder (***see, Vogel v. New York State Dept. of Taxation & Fin.***, 98 Misc 2d 222, 413 NYS2d 862; ***Chevlowe v. Koerner***, 95 Misc 2d 388, 407 NYS2d 427; ***Matter of Unger***, Tax Appeals Tribunal, March 24, 1994, ***confirmed*** 214 AD2d 857, 625 NYS2d 343, ***lv denied*** 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is an officer or employee liable for tax must be determined upon the particular facts of each case (***Matter of Cohen v. State Tax Commn.***, 128 AD2d 1022, 513 NYS2d 564; ***Matter of Hall***, Tax Appeals Tribunal, March 22, 1990, ***confirmed*** 176 AD2d 1006, 574 NYS2d 862; ***Matter of Martin***, Tax Appeals Tribunal, July 20, 1989, ***confirmed*** 162 AD2d 890, 558 NYS2d 239; ***Matter of Autex Corp.***, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether a person is authorized to sign the corporation's tax returns, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]). As summarized in ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990):

> [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 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 at 865; ***Chevlowe v. Koerner, supra***, 407 NYS2d at 429; ***Matter of William Barton***, [Tax Appeals Tribunal, July 20, 1989]; ***Matter of William F. Martin, supra; Matter of Autex, supra***).

Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (***Matter of Constantino, supra; Matter of Chin***, Tax Appeals Tribunal, December 20, 1990).

D. Upon review of the entire record, it becomes clear that petitioner was properly held responsible for the sales tax obligations of the corporation. In order to prevail in this case, petitioner was required to establish by clear and convincing evidence that she was not an officer having a duty to act on behalf of the corporation, i.e., that she lacked the necessary authority or she had the necessary authority, but she was thwarted by others in carrying out her corporate duties through no fault of her own (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998). Neither of these circumstances accurately describes the facts of this case.

E. The facts in this case indicate that petitioner was a responsible officer of the corporation. She was president of the corporation and she and her husband each owned 50% of its stock. She was the general manager of the restaurant. She had authority over the checking accounts and signed checks in payment of sales tax. She was authorized to sign tax returns (and other returns) and did in fact do so. Petitioner does not dispute that she was a person responsible for the collection of sales taxes on behalf of 1880 House, Inc. until the corporation ceased operations during the quarter ending August 31, 1998. She claims that the corporation ceased operations on August 17, 1998, the date on which the landlords, Ms. Posner and Mr. Cohen, forced the restaurant to close. She also claims that Ms. Posner and Mr. Cohen removed her as general manager on August 17, 1998. Petitioner argues that she did not have the authority to either file the sales tax return or remit the sales tax after her discharge. There is no evidence that

her ability to act on behalf of the corporation was in any way restricted after August 17, 1998. Indeed, the record shows that she was not precluded from exercising authority over the financial affairs of the corporation. Petitioner admits that the corporation's bank accounts did not have balances sufficient to allow it to pay over the $14,118.80 in sales tax it collected, when it ceased operation. Petitioner utilized the balances in the corporate accounts to make the $8,000.00 partial payment that accompanied the sales tax return that the corporation filed on September 20, 1998. Simply put, the record does not support the conclusion that petitioner did not have control over corporate affairs (***see, Matter of Harshad Shah***, Tax Appeals Tribunal, February 25, 1999). Accordingly, petitioner was properly held responsible for the corporation's sales tax obligations for the quarter ending August 31, 1998.

F. The September 28, 2000 Notice of Determination was issued to petitioner as a person liable for sales and use taxes due from 1880 House. It has already been established that petitioner was such a person. Petitioner asserts that the Notice of Determination should be canceled because the Division failed to present any admissible evidence of the basis for the assessment. She argues that the document, the unsigned final amended sales and use tax return, is unverified hearsay and cannot be relied upon as the basis for the amount of the corporate tax liability and her tax liability.

Petitioner's arguments are without merit. In the instant matter, the parties consented to have the matter determined without a hearing (20 NYCRR 3000.12). In accordance with the briefing schedule set by the administrative law judge, both parties submitted documents relevant to the issues. Among the documents submitted by the Division as evidence of the basis of its assessment were the Notice of Determination and the unsigned final amended sales and use tax return. The filed return, in the possession of the Division, is evidence of the corporation's self-

assessment of any tax reported and unpaid (***Matter of Megson v. New York State Tax Commn.***, 105 AD2d 481, 480 NYS2d 615). As a document in the possession of the Division it is specifically authorized to be admitted in an administrative hearing (State Administrative Procedure Act § 306[2]). Hearsay evidence is admissible in administrative proceedings and may even serve as the basis for the administrative determination (***see, Matter of EJG Corp. v. State Liquor Authority***, 213 AD2d 924, 624 NYS2d 68; ***Matter of Gray v. Adduci***, 73 NY2d 741, 536 NYS2d 40). Furthermore, it is well established that a notice of determination is entitled to a presumption of correctness, and the burden is on the taxpayer to show that the notice is incorrect (Tax Law § 1132[c]; ***see, Matter of Shukry v. Tax Appeals Tribunal***, 184 AD2d 874, 875-876, 585 NYS2d 531, 532; ***Matter of Hammerman***, Tax Appeals Tribunal, August 17, 1995). Although petitioner asserted that the corporation's sales tax liability for the period in issue was approximately $14,000.00, she failed to submit the corporation's books and records or any other probative evidence to support that assertion. Petitioner has failed to establish by clear and convincing evidence that the amount of tax assessed is erroneous (***Matter of Blodnick v. New York State Tax Commn.***, ***supra***).

G. Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for failure to file a return or to pay any tax under Article 28 in a timely manner. The penalty may be abated if the delay or failure was due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][iii]). The taxpayer bears the burden of establishing reasonable cause as well as the absence of willful neglect (***see, e.g., Matter of T.V. Data, Inc.***, Tax Appeals Tribunal, March 2, 1989).

Reasonable cause includes any cause for delinquency which would appear to a person of ordinary prudence and intelligence as reasonable cause for the delay in filing a sales tax return

and paying the tax imposed under Articles 28 and 29 of the Tax Law (20 NYCRR former 536.5[c][5]).

H. Petitioner asserts that the penalties should be abated because she made every effort to ensure that the sales taxes due for the period in issue were timely paid. She claims that, prior to leaving, she arranged the sale of some of the corporation's assets because the funds in the corporation's checking accounts were insufficient to pay the entire sales tax liability for the period in issue. She further claims that the sale was canceled by the controlling shareholders who disposed of the assets and applied the proceeds to some other purpose.

It has been held that reasonable cause for failing to timely pay over sales and use taxes does not include financial inability or the need to use the taxes collected for other more pressing obligations (***see, Matter of F & W Oldsmobile v. Tax Commn.***, 106 AD2d 792, 484 NYS2d 188). Accordingly, petitioner's request for abatement of penalties is denied.

I. The petition of Jennifer Vallone is denied and the Notice of Determination issued on September 28, 2000 is hereby sustained.

DATED: Troy, New York
September 5, 2002

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE