

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DECLAN P. REDFERN : DETERMINATION
 : DTA NO. 818797
for Revision of a Determination or for Refund of :
New York State Sales and Use Taxes under Articles :
28 and 29 of the Tax Law for the Period March 1, 1998 :
through May 31, 2000. :
:

Petitioner, Declan P. Redfern, 7 Reeback Drive, Valhalla, New York 10595, 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 March 1, 1998 through May 31, 2000.

A small claims hearing was held before Joseph W. Pinto, Jr., Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 13, 2003 at 9:15 A.M. All briefs were submitted by March 28, 2003, which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Gail Elliott).

ISSUE

Whether petitioner was a person responsible for the collection and payment over of sales and use taxes on behalf of Le Gamin, Inc. during the audit period.

FINDINGS OF FACT

1. During the period March 1, 1998 through May 31, 2000 (the “audit period”), petitioner was employed full time in the practice of law as a member of the firm of Kayser & Redfern, LLP.

2. Petitioner was a personal friend and attorney for Robert Arbor, the president and majority shareholder of Le Gamin, Inc., which owned and operated a restaurant called Le Solex in New York City. Mr. Arbor was the president of the corporation, and he was solely responsible for collecting sales and use taxes on behalf of the corporation, had all the day-to-day management duties, sole check signing authority, and did, in fact, sign all the checks and tax returns. Mr. Arbor never asked petitioner for any business advice, since this was Mr. Arbor’s area of expertise. Further, Mr. Arbor never shared the business books and records with petitioner unless it was necessary in the course of rendering legal services.

3. In or about February 1996, Mr. Arbor contacted petitioner and requested that he form the corporation, Le Gamin, Inc., and negotiate a lease for the restaurant.

4. Le Gamin, Inc. was incorporated on February 26, 1996, and shares were issued to Mr. Arbor (four shares), his wife (three shares) and petitioner (three shares). The stock reflected holdings in another entity which was a prior restaurant business owned by Mr. Arbor and his wife and in which petitioner had made an investment. Money from the prior business was used to fund the start-up of Le Gamin, Inc.

5. Mr. Arbor was appointed president of Le Gamin, Inc. and petitioner was named secretary on an interim basis to perform various ministerial acts in connection with the start-up of the business, primarily because New York law did not permit Mr. Arbor to serve as both president and secretary. In addition, all three shareholders were named directors.

6. Petitioner resigned as secretary in April of 1998, but remained a director of Le Gamin, Inc. This was consistent with Article III of the By-Laws of Le Gamin, Inc., which provided that the number of directors could not be less than the number of shareholders.

7. Since 1987, petitioner was employed full time by the firm of Kayser & Redfern, LLP and never worked for Le Gamin, Inc. or any of Mr. Arbor's restaurants. He received no wages from Le Gamin, Inc., only a share in the profits and losses set forth on a schedule K-1. The schedule K-1 indicated that petitioner received \$5,742.00 from the business in 1998 and losses of \$1,618.00 and \$456.00 in 1999 and 2000, respectively. Although not *de minimis*, the profit received in 1998 was a very small percentage of petitioner's total income reported for that year.

8. Petitioner never signed sales and use tax returns; had no check signing authority; had no management or control functions in the business; made no financial decisions for the company; did no bookkeeping; never hired or fired staff; and never paid or directed that creditors or vendors be paid.

9. Petitioner was legal counsel to Le Gamin, Inc., who formed the corporation, prepared its annual corporate minutes, negotiated a lease for the restaurant and performed trademark work for which the corporation paid fees to petitioner's law firm.

10. Petitioner had no operational control or decisionmaking responsibilities on behalf of Le Gamin, Inc., but was a passive investor who was retained from time to time to render legal services for which his firm was compensated.

11. Based on its conclusion that petitioner was an officer and/or person responsible for the collection and payment over of sales and use taxes on behalf of Le Gamin, Inc., the Division of Taxation issued the following notices to him:

Notice Number	Date	Notice Type	Period Ending	Amount
L-018593593	10/10/2000	Determination	05/31/2000	\$50.00
L-018593594	10/10/2000	Estimated Determination	02/29/2000	\$7,738.50
L-018593595	10/10/2000	Estimated Determination	11/30/1999	\$7,738.50
L-018593596	10/10/2000	Determination	05/31/1999	\$6,628.55
L-018593597	10/10/2000	Determination	08/31/1999	\$5,492.44
L-018593598	10/10/2000	Determination	02/28/1999	\$7,738.50
L-018593599	10/10/2000	Determination	11/30/1998	\$5,777.64
L-018593600	10/10/2000	Determination	08/31/1998	\$7,231.53
L-018593601	10/10/2000	Determination	05/31/1998	\$10,093.77

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation . . . who as such officer, director or employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [article 28]" (Tax Law § 1131[1]).

B. The determination that an individual is a responsible person depends upon the particular facts of each case (*Stacy v. State*, 82 Misc 2d 181, 183; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, *inter alia*, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (see, 20 NYCRR 526.11[b][2]; *Matter of Cohen v. State Tax*

Commn., 128 AD2d 1022; *Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437; *Matter of Rosenblatt v. State Tax Commn.*, 114 AD2d 127, *revd in part on dissenting opn below* 68 NY2d 775).

C. Applying these criteria to the instant circumstances, it is concluded that petitioner was not a person responsible for the collection and payment of sales and use taxes on behalf of Le Gamin, Inc. His brief officer status was assumed for the purpose of setting up the corporate entity for his client, Mr. Arbor, and his director's title was taken to comply with the requirements of the by-laws. Although maintaining these titles, further scrutiny reveals that petitioner was merely legal counsel to the business and a passive investor who, as a minority shareholder, did not derive substantial income or profit from Le Gamin, Inc.

Petitioner was not involved in any facet of the day-to-day operations of the business. He never worked at the restaurant; was not a signatory on any bank accounts; never signed any tax returns; never dealt with vendors or creditors; and never hired or fired staff. He was never consulted for business advice outside of legal issues a client would ask his attorney about, and he had no control or access to any of the corporate books and records. In fact, the president of the corporation, Mr. Arbor, credibly testified that he was solely responsible for collecting sales and use taxes on behalf of the corporation, had all the day-to-day management duties, sole check signing authority, and did, in fact, sign all the checks and tax returns.

D. Finally, petitioner's officer, director and shareholder status is more than offset by circumstances relating to control of the corporation (*see, Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990 [where the Tax Appeals Tribunal concluded that the minority shareholder was precluded from corporate management and financial activities by the power of another in the corporation]). Petitioner herein was a minority shareholder and Mr. Arbor and his

wife owned 70% of the stock. Mr. Arbor clearly and credibly stated that petitioner was never consulted for business advice and never shared the business books and records with him. It is concluded that, like the petitioner in *Matter of Constantino (supra)*, Mr. Redfern was precluded *de facto* from engaging in corporate management and financial activities of the corporation.

E. The petition of Declan P. Redfern is granted and the nine notices of determination and estimated determination, dated October 10, 2000, are canceled.

DATED: Troy, New York
May 1, 2003

/s/ Joseph W. Pinto, Jr.
PRESIDING OFFICER