STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of **OHEKA MANAGEMENT CORP. AND PAMELA AND GARY MELIUS** for Revision of Determinations or for Refund of New York State Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1993 through November 30, 1999.	:	DETERMINATION DTA NOS. 819166, 819167 AND 819168

Petitioners, Oheka Management Corp., 135 West Gate Drive, Huntington, New York 11743-6052, and Pamela and Gary Melius, 54 Sandy Hill Road, Oyster Bay, New York 11771-3110, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1993 through November 30, 1999.

On June 5, 2003 and June 13, 2003, respectively, petitioners, appearing by Hodgson Russ LLP (Alvan L. Bobrow, Esq., of counsel) and the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Cynthia E. McDonough, Esq., of counsel), waived a hearing and agreed to submit the matters for determination based on documents and briefs to be submitted by May 10, 2004, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly determined that room rental fees billed by the caterer Oheka Castle Catering, Inc. to its customers, are taxable as "other charges" under Tax Law § 1105(d)(i) and 20 NYCRR 527.8(f), for which petitioners, Oheka Management Corp. and Pamela Melius and Gary Melius, should be held responsible.

II. Whether the Division of Taxation properly determined that petitioner Oheka Management Corp. and Oheka Castle Catering, Inc. were co-vendors for catered events, resulting in the room rental charges being taxable to Oheka Management Corp. under Tax Law § 1105(d)(i).

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a notice of determination to petitioner Oheka Management Corp. ("OMC"), dated July 30, 2001, for sales and use taxes due pursuant to Articles 28 and 29 of the Tax Law in the amount of $148,776.85, plus interest, for the quarters ended February 28, 1994 to November 30, 1999.

The Division also issued notices of determination to petitioners Pamela and Gary Melius, dated August 23, 2001, for sales and use taxes due pursuant to Articles 28 and 29 of the Tax Law in the amount of $148,776.85, plus interest, for the quarters ended February 28, 1994 to November 30, 1999, as officers or responsible persons of OMC.

2. Petitioner OMC leases and manages Oheka Castle on Long Island, a large estate formerly known as the Otto Hermann Kahn Mansion. Oheka Castle is leased by OMC for various functions, including weddings, parties, shows, photography shoots, magazine spreads and charitable and civic functions.

3. Pamela Melius was the sole shareholder of OMC, and petitioner Gary Melius, Pamela's husband, was OMC's president.

4. In 1993, Carlton Gourmet, Ltd. d/b/a Carlton Caterers ("Carlton"), a company unrelated to OMC, became the in-house caterer at Oheka Castle. Carlton was a very profitable business and Gary Melius viewed it as an excellent investment. In July 1996, Gary and Pamela Melius purchased Carlton and thereafter transferred the business to Oheka Castle Catering, Inc. ("OCC"), a company solely owned by petitioner Gary Melius. Pamela Melius became president of OCC.

5. The business background of Pamela and Gary Melius was predominantly real estate, and they were not well versed in the operations of a catering business. When they acquired Carlton, they allowed the principal managers to stay on to run the day-to-day operations. OCC adopted the same contract form and terms previously used by Carlton. Enzo Brun, Carlton's banquet manager, was requested to continue in his position when OCC took over the catering and was promoted to general manager. Mr. Brun and his staff ran all the day-to-day operations of OCC with no oversight by Pamela or Gary Melius.

6. Both before and after the acquisition of Carlton, a bride and groom planning a typical wedding would first meet with a sales representative from Carlton, or later OCC, at their respective offices. OCC's office was located at 135 West Gate Drive, Cold Springs Hills. If the date requested was available and the terms of the event acceptable, a contract would be executed for catering services and a deposit paid to the catering company. The contract was signed by a manager for Carlton or OCC.

Next the bride and groom would make arrangements with petitioner OMC's leasing office at One Old Country Road, Suite 420, Carle Place, to see if the Oheka Castle banquet facilities were available for the same date booked with the caterer. If the date could be accommodated and the terms were acceptable, a contract would be executed and a deposit paid. Petitioner OMC's president, Gary Melius, generally signed the leasing agreements for OMC.

7. The OCC agreement that it executed for its catering services and arrangements with customers was the same agreement used by Carlton. At the bottom of the agreement, the following preprinted information appeared:

> Additional rental charge for facility in the amount of $____________ to be paid pursuant to separate lease agreement with Oheka Management Corp. Oheka Management Corp must receive deposit for said lease within 10 days.
>
> NOT INCLUDED
> Music * Flowers * Photography * Sales Tax
> Rental Fee for Facility

8. Separate and apart from OCC's catering agreement, lease agreements were executed by OMC and signed by Gary Melius. Among other provisions, the agreements provided for the lease terms of Oheka Castle, including the rental fee, date and time of rental and payment terms.

9. The OCC invoices separated the charges for catering services and rental services. The customer was instructed to make out checks for Oheka Castle rental payable to OMC and checks for catering to OCC. The receipts for the use of the building were recorded on petitioner OMC's books, and all other receipts for the affair were recorded on the books of OCC.

10. During the audit period, OMC contracts and lease agreements listed an address of One Old Country Road, Carle Place, New York 11514, and OCC invoices list an address of 135 West Gate Drive, Cold Springs Hills, New York 11743. Each of the companies had separate phone numbers.

11. Petitioner OMC and OCC each obtained separate and distinct permits as required for their respective operations.

12. OMC and OCC maintained separate business checking accounts at the same bank.

13. OMC and OCC prepared separate sales and accounts receivable reports for their revenue and balances due, respectively, from customers' affairs.

14. The payroll records for OMC and OCC indicate different employees worked for each entity.

15. Petitioner OMC had not registered for sales and use tax purposes because its primary source of revenue was from leasing real property, which is not subject to sales tax. Thus, OMC did not file any sales tax returns for the audit period.

16. Another affiliated corporation, Oheka Maintenance Corporation provided maintenance services at Oheka Castle. When Oheka Maintenance ceased doing business in December 1998, OMC began recording the maintenance services income.

17. The Division conducted a sales and use tax field audit of petitioners for the period December 1, 1993 through November 30, 1999. The total amount assessed of $148,776.85[1] was made up of four components: sales tax on the rental of Oheka Castle, admission charges on an event, income from maintenance services and vendor's expense accounts.

During the audit period, petitioners held an event at Oheka Castle known as a Designer's Showcase for which the public was charged admission fees, and OMC did not report or remit sales tax on the fees. On audit, the Division asserted additional sales tax of $17,556.74 on the admission charges.

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[1] It is acknowledged that the total of the component amounts below equals $148,776.94, presumably due to some rounding.

Additional sales and use tax in the amount of $1,269.01 for income from maintenance services previously reported by Oheka Maintenance, and $3,522.00 for a test period audit of the vendor's expense accounts were assessed.

Lastly, the additional sales tax asserted included $126,429.19 on rental receipts for catered events, and this represents the disputed portion of the assessment.

18. The Division did not assess sales tax against petitioner OMC for the rental receipts prior to September 1, 1996, the time during which Carlton was the caterer at Oheka Castle. For periods commencing on and after September 1, 1996, when OCC was acquired by Gary and Pamela Melius, the rental receipts were deemed taxable.

SUMMARY OF THE PARTIES' POSITIONS

19. Petitioner OMC maintains that the Division improperly included the rental of the property as listed on the caterer's invoice as an "other charge" subject to sales tax within the meaning of Tax Law § 1105(d)(i). Petitioner OMC also maintains that the application of Tax Law § 1105(d)(i) to it is in error, since that provision is limited to caterers.

Further, since OMC was assessed under a provision which taxes caterers, and petitioner OMC is not in the business of catering, petitioners believe the Division should have assessed OCC, if anyone. For the Division to reach OMC or the individuals with its theory, it would have to pierce the corporate veils of OMC and OCC and consider their operations as one company.

20. The Division argues that rental receipts from the banquet hall become taxable when the real property is leased by a caterer along with its food and other services, as an "other charge," pursuant to Tax Law § 1105(d)(i). The Division maintains that OCC acted on behalf of OMC in renting Oheka Castle, making OMC a co-vendor of OCC, and jointly liable for the sales tax imposed on the "other charges."

CONCLUSIONS OF LAW

A. In pertinent part, Tax Law § 1105(d)(i) imposes sales tax on:

> The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment *or other charge* made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section [applicable only to an issue not disputed]):
>
> (1) in all instances where the sale is for consumption on the premises where sold;
>
> (2) in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink (emphasis added).

B. The Division maintains that since OCC charged its customers for the rental of Oheka Castle, with such rental charges shown on both OCC's catering contract and on OCC's invoices to its customers, the amount charged for the facility rental of Oheka Castle should be subject to sales tax pursuant to Tax Law § 1105(d)(i) as an "other charge." In favor of its position the Division cites to the corresponding regulation, 20 NYCRR 527.8, and numerous authorities which will be discussed below.

20 NYCRR 527.8(f) provides taxation rules applicable to caterers, as follows:

> (1) Sales by caterers. (i) All charges by caterers selling food or drink who provide serving or assistance in serving, cooking, heating or other services after delivery are taxable.
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> * * *
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> Example 1: A vendor has contracted to cater a wedding party at a private hall. The caterer will furnish food and drink, music, kosher supervision, bartenders, waiters and waitresses, and coat checking all of which will be billed by the caterer. All the charges are taxable.
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> * * *
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> (2) Purchases by caterers.
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> * * *

> Example 4: A vendor has contracted to cater an outdoor party at a private residence. The caterer is responsible for making all arrangements for the customer such as providing a tent, tables, chairs, linens, silverware, chinaware, napkins, glassware, portable dance floor, bars, floral arrangements for the tables, a band, serving personnel (who are employees of the caterer), food (roast beef, salad, vegetables and dessert--all prepared by the caterer), alcoholic beverages, soft drinks and valet service. The caterer must pay tax on any rental or purchase of the tent, tables, chairs, linens, silverware, chinaware, napkins, glassware, portable dance floor and bars, as well as any floral arrangements not purchased in accordance with the conditions set forth in subparagraph (v) of this paragraph.
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> The charges by the band and by the valet service are not taxable to the caterer since they are not services subject to tax. The caterer's purchases of the uncooked meat and the salad, vegetable and dessert components are exempt from tax in accordance with section 528.2 of this Title. The caterer's purchases of alcoholic beverages and soft drinks are purchases for resale, not subject to tax, in accordance with section 527.1(a) of this Title. The caterer's entire charge to the customer is taxable.

C. The Division's argument is flawed. OCC did not charge its customers for the rental of Oheka Castle, OMC did. OMC managed Oheka Castle, set the rates and signed the rental contract with its customers. Although the rental charges are shown on OCC's catering contract, it is made clear that the charges are separate from the costs of catering, and that a separate check must be issued to OMC for the rental charges. It could not be more clear that the two corporations, OMC and OCC, handled different aspects of the numerous affairs.

Further, the contract language used by Carlton was the same as that used by OCC. The Division agreed that the rental charges at the time Carlton was the caterer were not subject to sales tax. Only after OCC became the caterer, the taxation of the castle rental changed. Both before OCC took over and after, the catering was handled by a separate corporation with its own address, phone number, bank account and employees. If the rental fees were "other charges" to OCC, taxable to OMC, then the Division should have asserted the same against OMC through Carlton. The Division was not consistent in its application of Tax Law § 1105(d)(i).

The Division cited to ***Matter of Hunts Point Palace*** (State Tax Commission, June 19, 1986 [TSB-H-86(138)S]) in support of its position. In ***Matter of Hunts Point Palace*** the rental charges for rooms were considered part of a caterer's total charges to its customers and thus became part of the receipts subject to sales tax under Tax Law § 1105(d)(i). In that matter, petitioner was engaged in the rental of banquet rooms and for certain functions would also provide food and other catering services. A key difference between ***Hunts Point Palace*** and this matter is the fact that only one corporation existed in ***Hunts Point Palace***. It performed both functions and when it added the catering to the facility rental it generally provided, the State Tax Commission determined that the charge for the rental of the room became taxable. Further, with regard to former State Tax Commission decisions, the Tax Appeals Tribunal has previously stated that:

> [a]s decisions of a body of coordinate jurisdiction, the State Tax Commission decisions are not binding precedent for us, but are entitled to respectful consideration [citation omitted] (***Matter of The Racal Corp. & Decca Elecs***., Tax Appeals Tribunal, May 13, 1993).

I disagree with the Division's reliance on ***Hunts Point Palace***, given the different facts, the former State Tax Commission's brief Findings of Fact and limited analysis of Tax Law § 1105(d)(i).

Next the Division cited ***Matter of Atrium Kosher Catering, Ltd.*** (Advisory Opinion [TSB-A-03(20)S]), where petitioner, a caterer, provided a separate "ceremony room" to hold the wedding ceremony if it was not held outdoors or in the ballroom where the catered affair took place. Petitioner therein collected sales tax on the entire fee it charged for catering a wedding. The Advisory Opinion sought an answer to whether a separately stated charge for the rental of the ceremony room would be subject to sales tax when such charge was in connection with the catering of the wedding reception in another room at the same location. Citing ***Hunts***

Point Palace the Division determined that the charge for the ceremony room should be considered an "other charge" pursuant to Tax Law § 1105(d)(i), and subject to sales tax. Again, the distinguishable difference is that only one corporation was providing the services, not two as in the matter at hand. Further, with regard to Advisory Opinions, they are written statements issued on behalf of the Commissioner of Taxation regarding the application of the Tax Law to a specific set of facts. Advisory opinions are not binding on the Commissioner except with respect to the person to whom the opinion is issued (Tax Law § 171[24]).

Since I believe there to be a significant distinction between ***Matter of Atrium Kosher Catering, Ltd.*** and this matter, I am not persuaded to rely on the Division's application of it to these facts.

D. Petitioners argue that the statutory construction rule of *ejusdem generis* should be applied in this matter since there is no authority for the Division's position that the charge by a caterer for the rental of real property is an "other charge" subject to sales tax. Black's Law Dictionary offers the following definition of the rule:

> In the construction of laws, . . . the 'ejusdem generis rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned (Black's Law Dictionary 464 [5th ed 1979]).

The rule of ejusdem generis is intended to aid in ascertaining and giving effect to the legislative intent where there is uncertainty as to the meaning of a particular clause in a statute (73 Am Jur 2d Statutes § 136).

> *Ejusdem generis*, meaning "of the same kind," is a rule frequently used in the interpretation of statutes, by which the scope of a word is limited by the surrounding terms. Under this rule, where words

> of specific or inevitable purport are followed by words of general import, the application of the last phrase is generally confined to the subject matter disclosed in the phrases with which it is connected . . . and though it might be capable of a wider significance if found alone, it is limited in its effect by the words to which it is an adjunct.
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> Where a statute enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces "other" person or things, the word "other" will generally be read as "other such like," so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from, those specifically enumerated. (McKinney's Cons Laws of NY, Book 1, Statutes § 239.)

Isolating the statute, I agree with petitioners' argument that ejusdem generis would support a conclusion that "other charges" was indeed not meant to encompass the rental of real estate or any charges by a caterer other than those charges similar to a cover, minimum or entertainment charge. However, the statute cannot be read without the corresponding regulations, unless such regulations are determined to be invalid. In this case 20 NYCRR 527.8(a) repeats the statutory language of Tax Law § 1105(d)(i) with a slight adjustment in phraseology. 20 NYCRR 527.8(f) then specifically addresses additional regulations applicable to caterers. Tax Law § 171 gives the commissioner of taxation and finance the power to "make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the exercise of its powers and the performance of its duties . . . ." The Division of Tax Appeals has authority to rule on the validity of regulations promulgated by the Division of Taxation (***see***, Tax Law § 2006[7]). If reasonable, the regulations of a State agency have the force and effect of law (***se***e, ***Molina v. Games Management Services***, 58 NY2d 523, 462 NYS2d 615). In general, the Division's regulations must be upheld unless shown to be irrational and inconsistent with the statute (***Matter of Slattery Assocs. v. Tully***, 79 AD2d 761, 434 NYS2d 788, ***affd*** 54 NY2d 711, 442

NYS2d 978) or erroneous (***Matter of Koner v. Procaccino***, 39 NY2d 258, 383 NYS2d 295). The regulations repeat the statutory language and then expand the taxation of items with regard to caterers. Although I find the regulations reach further than the statute, I do not find the regulations to be unreasonable, irrational or erroneous. Thus, the rule of ejusdem generis does not resolve this dispute in petitioners' favor and the regulations applicable to caterers are deemed valid and must be applied in this case.

E. Petitioner OMC maintains that, as a matter of law, the Division improperly included the rental of the property as listed on the caterer's invoice as an "other charge" subject to sales tax within the meaning of Tax Law § 1105(d)(i), and even if this provision should include the real property rental, OCC was the taxpayer that should have been subject to such taxation, not petitioner OMC, which is not in the business of catering. In order to justify assessment of OMC, with a theory that it is applying to the caterer, OCC, the Division then claims that the two corporations are affiliated and acted as co-vendors for the transactions in issue, citing Tax Law § 1101(b)(8), which defines the term "vendor," as applicable herein, as including:

> (i) . . . (A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;
>
> (B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article.
>
> * * *
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> (ii)(A) In addition, when in the opinion of the commissioner it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he operates or from whom he obtains tangible personal property sold by him, or for whom he solicits business, the commissioner may, in his discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment over of the tax. An unaffiliated person providing fulfillment services to a purchaser shall not be treated as a vendor by the commissioner under this paragraph with respect to such activity. For purposes of this clause, persons are affiliated persons with respect to

each other where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other.

The co-vendor argument does not apply to this case. In attempting to apply Tax Law § 1108(b)(8), the "vendor" would have to be OCC which is in the business of making sales of tangible personal property taxed by Article 28. If OCC is the vendor, then pursuant to the statutory classification OMC would have to be the agent of the vendor, from whom it acquires tangible personal property sold by OMC (which does not happen) or for whom OMC solicits business (which has not been suggested). Based on the facts of this case, there is insufficient proof that co-vendor status exists between OMC and OCC.

F. The Division argues several theories of "other charges" and co-vendors. However, these arguments are being used to replace the Division's underlying theories of alter egos and piercing the corporate veil. The Division readily admits that prior to 1996 when Gary and Pamela Melius acquired the stock of the corporation that would become OCC, it did not consider rental of Oheka Castle as a transaction subject to sales tax. Only after OCC became the primary caterer for Oheka Castle, with ownership by Gary Melius, did the Division change its posture regarding taxation of the same transaction. The Division's decision to pierce the corporate veil or consider the two corporations as alter egos appears to lack respect for the concept of separate corporate entities. Thus, it is critical to review the standards that should be applied if the corporate veil should be pierced.

G. Within the context of the Tax Law, a corporate entity is sometimes disregarded when the functions of the corporation are such that it is essentially no more than the alter ego of its shareholders or when its formation is a sham. A question frequently arises as to whether the corporation was formed for the purpose of carrying on a “business activity.” Under this so-called "business purpose" test, a corporation may not be disregarded if a bona fide intention in creating it was that the corporation should have a substantial business function. However, in the absence of such intent or business activities the corporation may be disregarded with respect to taxation events. The intended or actual business function of the corporation and not the taxpayer's aim to be accomplished by way of the corporation should be the primary focus (***see generally,*** Mertens, Law of Federal Income Taxation § 38.06.) It is true that the formation of a corporation to engage in a legitimate business purpose points toward a respecting of the corporate form for tax purposes (***see, Moline Properties v. Commr.***, 319 US 436; ***see generally***, 6 Fed Tax Coordinator 2d [RIA] ¶ D-1206 *et seq.*). The New York Court of Appeals in ***Matter of Morris v. New York Sate Department of Taxation and Finance*** (82 NY2d 135, 603 NYS2d 807) set forth in great detail what is to be considered when disregarding the corporate form:

> The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners (***see, Bartle v Home Owners Cooperative Inc.***, 309 NY 103, 106**;** ***Rapid T. Subway Constr. Co. v City of New York***, 259 NY 472, 487-488; Presser, Piercing the Corporate Veil, §1.01, at 1-4 - 1-5).
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> The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation (***see, e.g., Billy v Consolidated Machine Tool Corp***., 51 NY2d 152; ***Port Chester Electrical Construction Corp. v Atlas***, 40 NY2d 652; ***Walkovsky v Carlton,*** [18 NY2d 419] ***supra***; ***Bartle v Home Owners Cooperative Inc., supra***). The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed (***see,*** 1 Fletcher, Cyclopedia of Private Corporations, §41, at 603 [perm ed]). Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners (***see, id.***, at 602-603).

> Because a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised (***see,*** Presser, Piercing the Corporate Veil, §2.33 [1], at 2-291 to 2-293). Generally, however, piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (***see, Guptill Holding Corporation v State***, 33 AD2d 362, 364-365, ***affd*** 31 NY2d 897; ***Lowendahl v Baltimore & Ohio R.R.***, 247 AD2d 144, 157, ***affd*** 272 NY 360; ***American Protein Corp. v AB Volvo***, 844 F2d 56, 60 [2d Cir 1988] [analyzing New York law and citing ***Lowendahl (supra)]***; ***International Aircraft Trading Co. v Manufacturers Trust Co.***, 297 NY 285, 292; ***see generally,*** Presser, Piercing the Corporate Veil, §2.33 [3], at 2-304 to 2-313).
>
> While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business (***see, Walkovsky, supra***, at 417), such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required (***see, Guptill, supra***, 33 AD2d at 365; ***Lowendahl, supra***, 247 AD at 157; ***Passalacqua Builders v Resnick Developers***, 933 F2d 131, 138 [2d Cir 1991] [applying New York law]; ***see generally***, 18 Am Jur 2d, Corporations, §51). The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene (***see, Guptill, supra***, 33 AD2d at 365; ***National Labor Relations Board v Greater Kansas City Roofing***, 2 F3d 1047, 1052-1053).

In deciding whether the Division has established a sufficient basis for piercing the corporate veil or considering the companies as alter egos, the first element to be examined is Gary and Pamela Melius's control of the corporations. Although others exercised control within the functions of daily operations, the factor of control is not disputed. However, what is clearly missing, or certainly remains absent from the facts is any proof that any of the petitioners, including OMC abused the privilege of doing business in the corporate form to perpetuate a wrong against the Division. OCC became the successor corporation to Carlton and was not arbitrarily created where a corporation performing the catering did not previously exist. Mr.

Melius is described as a successful, astute business man. Yet he acknowledged that he and his wife were not experienced in the catering aspect of the business. Based on these facts, it would not be unusual for him to have good reason to keep the companies separate initially, or longer, for financial as well as operational reasons. When Mr. Melius took over Carlton, he went to great lengths to continue a seamless corporate operation, from adopting the catering contract utilized by the former caterer (which also bore the language in Finding of Fact "7"), to hiring and promoting Enzo Brun who was intimately familiar with the operations of the former caterer. Mr. Melius knew the former caterer had been profitable, and it was his goal to see this company continue in the same manner.

The books and records of OMC and OCC were separate, their bank accounts were separate, and for the audit period they operated from separate addresses, with separate phone numbers. Internal reports were prepared for the each of the entities. The only way for the Division's argument to prevail and have the assessment of rental charges for Oheka Castle subjected to sales tax is if there was sufficient justification to pierce the corporate veil or consider them as alter egos of one another. Inasmuch as the evidence submitted in this matter falls far short of such a showing, it is concluded that the Division improperly imputed the taxation of the rental charges of Oheka Castle to OMC and Pamela and Gary Melius. Accordingly, the notices of determination shall be adjusted to reflect such reduction.

H. The petitions of Oheka Management Corp. and Pamela and Gary Melius are granted to the extent of the sales tax assessed for the rental of Oheka Castle in the amount of $126,429.19, and the three notices of determination dated July 30, 2001 and August 23, 2001, respectively, are modified in accordance with Conclusion of Law "G." Otherwise such petitions are denied and the notices of determination sustained.

DATED: Troy, New York
November 10, 2004

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE