STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEWART CHOO	:	DETERMINATION DTA NO. 819789
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, 1997 through February 29, 2000.	:	

Petitioner, Stewart Choo, 5 Dalewood Drive, Suffern, New York 10901, 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 September 1, 1997 through February 29, 2000.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 20. 2004 at 10:30 A.M., with all briefs to be submitted by January 7, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel).

ISSUES

I. Whether petitioner was personally liable for the sales and use taxes due on behalf of 19 St. Deli, Grocery, Inc. as a person required to collect and pay such taxes under Tax Law §§ 1131(1) and 1133(a).

II. Whether the audit method employed by the Division of Taxation in its audit of 19 St. Deli, Grocery, Inc. was reasonable or whether petitioner has shown error in either the audit method or the result thereof.

III. Whether penalty assessed by the Division of Taxation should be abated.

FINDINGS OF FACT

1. On October 26, 2000, the Division of Taxation ("Division") issued a Notice of Determination to Stewart Choo which assessed additional sales and use taxes in the amount of $18,573.00, plus penalty and interest, for a total amount due of $30,069.01 for the period September 1, 1997 through February 29, 2000.

2. An audit of 19 St. Deli, Grocery, Inc. ("the deli") was commenced on April 11, 2000. On April 19, 2000, at approximately 9:00 A.M., the auditor went to the place of business which was located at 218 Third Avenue, New York, New York. At the time of the auditor's visit, the gate was locked and there was no light on inside the premises. A sign on the second floor wall indicated that the building was for sale (the sign listed a real estate agent and telephone number). An awning over the store stated: "19 St. Hot & Cold Gourmet Deli Food Express" and listed fried chicken, barbecue and hamburgers as items offered for sale.

The auditor telephoned the real estate agent listed on the sign and was informed that the owner of the building (Mr. Kim) had evicted the deli approximately four to six months ago. When contacted by the auditor, Mr. Kim stated that the deli had been evicted on January 10, 2000 for nonpayment of rent. He informed the auditor that the owner of the deli used several different names.

3. On the same day as his visit (April 19, 2000), the auditor sent an appointment letter via certified mail to the deli at the 218 Third Avenue address; the letter was returned and was marked "Moved, Not Forwardable." The appointment letter requested that all books and records pertaining to the deli's sales and use tax liability be provided including: financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns,

Federal income tax returns and exemption certificates. Attached to the letter was a checklist of records to be presented for the audit which, in addition to the records requested in the appointment letter, also requested: fixed asset invoices, bank statements, canceled checks and deposit slips.

4. The auditor later received a copy of the deli's sales tax registration form from another employee of the Division. Utilizing petitioner's home address as found on the registration form, the auditor sent another appointment letter to petitioner at 3100 47th Avenue, #6, Long Island City, New York 11101. This letter was also returned indicating that the addressee was unknown. On June 23, 2000, the auditor attempted to contact petitioner by telephoning him at the telephone number listed on the sales tax registration form, but he was informed that the number had been disconnected.

5. Utilizing an address for petitioner which the auditor obtained from his 1997 Federal income tax return (223 2nd Avenue, Apt. 3M, New York, New York 10003), the auditor, on June 27, 2000, sent another appointment letter along with a checklist of records required for audit to petitioner. The letter, sent by certified mail, was returned marked "Unclaimed."

On July 20, 2000, the auditor telephoned the landlord and requested a copy of the lease which was faxed to him on the same day. Using the address listed on the lease, the auditor sent another appointment letter and checklist of required records to petitioner at an address in New Jersey which was listed on the lease and on July 21, 2000, sent another appointment letter to petitioner at the 2nd Avenue address. The letters were returned as unclaimed.

As a result of the eviction of the deli in January 2000 and the failure, despite numerous attempts by letter and telephone, of the auditor to contact petitioner, no books and records of the deli's business were provided to the auditor.

6. The auditor obtained a survey form which had been prepared in conjunction with a visit to the business premises by Division investigators on August 12, 1999. The survey form indicated that there were two employees, one of whom operated the cash register. There were no guest checks; sales were rung up on the cash register. The trade name of the business was "One Stop Express." The deli sold cigarettes, beer, soda, candy, grocery items and sandwiches with prices ranging from $.99 to $3.50. Nontaxables sold included fruit, vegetables and newspapers. The hours of operation were 9:00 A.M. until 12:00 A.M. and the deli was open seven days per week. The investigators estimated that taxable sales were 75 percent of total sales. According to the survey form, the owner of the deli was Chuwn Suk.

7. The auditor obtained a schedule of sales tax returns filed for the audit period. No returns were filed for the last three quarters, i.e., for the sales tax quarters ended August 31, 1999, November 30, 1999 and February 29, 2000. Based upon the auditor's experience (over 26 years as a sales tax auditor, with approximately 20 percent of his audits involving grocery stores) and his familiarity with the area and the type of business, he found that sales reported by the deli were "very low." The sales tax returns filed during the audit period reported taxable sales of between 9 and 15 percent of total sales. The auditor's experience with similar audits indicated to him that taxable sales should have been a greater percentage of total sales.

8. Because the only record available to the auditor was the lease of the premises (the lease was a ten-year lease commencing on June 1, 1994), he decided to apply a rent factor to determine the deli's sales for the audit period.

The auditor utilized a Prentice Hall publication entitled, Almanac of Business and Industrial Financial Ratios (1997 Edition). Using the category "Retail Trade," the auditor chose the classification "Other Food Stores" and determined from the publication that the rent of a

store with assets under $100,000.00 should be 6.8 percent of sales. The auditor indicated that he had previously used a rent factor audit method when books and records had not been provided upon audit.

To determine the deli's taxable sales, the auditor utilized a chart which, based on statistics, concluded that for a deli/grocery, 45 percent of sales were taxable sales. The auditor then applied the 6.8 percent rent factor to the rent paid by the deli for each sales tax quarter during the audit period. The amount of rent paid was obtained from the lease provided by the landlord to the auditor. By applying the 6.8 percent to the rent paid, the auditor calculated adjusted gross sales which totaled $561,529.00 for the audit period. Multiplying the adjusted gross sales for each quarter by 45 percent (the auditor's estimation of the taxable percentage of total sales), resulted in adjusted taxable sales for each quarter (total taxable sales were found to be $252,688.00). Adjusted tax due was determined by multiplying adjusted taxable sales by the appropriate sales tax rate (8.25 percent) which resulted in total tax due for the audit period of $20,847.00. For the last quarter of the audit period (December 1, 1999 through February 29, 2000), the rent paid was reduced by approximately 44 percent to reflect the fact that the deli had been evicted on January 10, 2000. After giving credit for sales tax previously paid (a total of $2,272.00 was paid with various returns filed during the audit period), it was determined that additional tax was due in the amount of $18,575.00.

9. The Notice of Determination was issued by the Division to petitioner based upon the conclusion by the auditor that he was a responsible officer of the corporation. This conclusion was reached because petitioner had signed, as president of the corporation, a Biennial Statement with the State of New York, Department of State on October 12, 1998. In addition, petitioner had signed, as president, a form ST-134, Application for Registration of Retail Dealers and

Vending Machines for Sales of Cigarettes and/or Tobacco Products and had also signed, as president, sales tax returns for various quarters within the audit period.

10. On December 29, 2000, petitioner filed a petition with the United States Bankruptcy Court, District of New Jersey under Chapter 7 of the Bankruptcy Code and on April 9, 2001, petitioner was granted a discharge under section 727 of title 11, United States Code (the Bankruptcy Code) by Honorable Donald H. Steckroth, Unites States Bankruptcy Judge. The New York State Department of Taxation and Finance was not listed as a creditor on any of the schedules of the petition for bankruptcy and it was not listed on the mailing matrix list or certificate of service of creditors who were notified of the bankruptcy filing or subsequent discharge. The Division's Bankruptcy Unit was unable to locate a record of a bankruptcy filing for the deli.

SUMMARY OF PETITIONER'S POSITION

11. Petitioner stated that the major portion of his business was the sale of grocery items and that due to competition from a large supermarket nearby, even sales of those items were slow. He indicated that the deli sold primarily cigarettes, beer, soda and certain other grocery items.

At the hearing, petitioner stated that after he discharged the chef because sales did not warrant a $400.00 to $500.00 per week salary, he prepared much of the food which was sold at the deli. Petitioner worked at the deli approximately 14 hours per day, 7 days per week. After the chef was discharged, petitioner and his wife were the only employees of the deli.

Petitioner asserts that when he was unable to pay the rent, he was evicted in late December 1999 at which time he was told to take his personal belongings and then get out of the store. Everything was locked up at this point, including all of his records. Petitioner admitted that he

did not ask his accountant, who had prepared the deli's tax returns, if he had any of the deli's business records and did not ask the landlord of the business premises if any business records were left behind. Petitioner also stated that all sales and use taxes due had been paid.

CONCLUSIONS OF LAW

A. 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]). Petitioner bears the burden of proof to show that he was not such a person (***see***, 20 NYCRR 3000.15[d][5]).

B. The holding of corporate office does not automatically impose tax liability upon an office holder (***Chevlowe v. Koerner***, 95 Misc 2d 388, 407 NYS2d 427). Rather, the resolution of whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (***Matter of Cohen v. State Tax Commn.***, 128 AD2d 1022, 513 NYS2d 564; ***Stacy v. State***, 82 Misc 2d 181, 368 NYS2d 448). The Commissioner's regulations examine whether the person is authorized to sign the corporation's tax returns, is in charge of maintaining corporate records, or is responsible for managing the corporation (20 NYCRR 526.11[b][2]). In ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990), the Tax Appeals Tribunal stated:

> 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. 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 [citations omitted] (***Matter of Constantino, supra***).

C. In the present matter, petitioner has not contested the Division's determination that he was a responsible officer of the deli. Petitioner signed, as president, a Biennial Statement filed with the New York State Department of State, an Application for Registration of Retail Dealers and Vending Machines for Sales of Cigarettes and/or Tobacco Products filed with the Division and also signed, in the same capacity, sales tax returns for various quarters within the audit period. He worked full time at the deli, approximately 14 hours per day, 7 days per week. These facts indicate that petitioner had sufficient control over the affairs of the deli to be considered a responsible officer for the audit period.

D. In determining the adequacy of a taxpayer's books and records, the Division must first request and then thoroughly examine such records ***(Matter of Christ Cella, Inc. v. State Tax Commission***, 102 AD2d 352, 477 NYS2d 858; ***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826 ***lv denied*** 71 NY2d 806, 530 NYS2d 109). The Division made numerous attempts to contact petitioner (***see***, Findings of Fact "3" through "5"); however, all attempts, both by certified letter and telephone, were unsuccessful. On audit and even subsequent thereto (at a conciliation conference and at the hearing held herein), no books and records were made available upon which a detailed audit could be conducted. Under such circumstances, the Division was authorized to estimate the deli's sales tax liability (Tax Law § 1138[a][1]; ***Matter of Licata v. Chu***, 64 NY2d 873, 487 NYS2d 552).

E. While an audit methodology utilized by the Division to estimate sales must be reasonably calculated to reflect tax due, exactness is not required (***Matter of Markowitz v. State Tax Commission***, 54 AD2d 1023, 388 NYS2d 176, 177, ***affd*** 44 NY2d 684, 405 NYS2d 454;

Matter of Lefkowitz, Tax Appeals Tribunal, May 3, 1990). The burden rests with the petitioner to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451, 453).

In the present matter, other than a general assertion that the deli did not sell all of the food items advertised and that the business was losing money, petitioner produced no evidence to show that the audit methodology used was unreasonable or that the amount assessed was erroneous**.** Clearly, as noted by the Tax Appeals Tribunal, "Tax Law § 1138(a)(1) specifically authorizes the use of rental paid as an external index to measure the sales tax liability due (***see***, 20 NYCRR 535.2)" (***Matter of Bitable on Broadway***, Tax Appeals Tribunal, January 23, 1992). Petitioner has failed to sustain his burden of proving that the auditor's utilization of rent factor information from the Prentice Hall publication Almanac of Business and Industrial Financial Ratios (1997 Edition) was unreasonable or that the results of the audit were erroneous. Moreover, petitioner failed to show that the auditor's use of a 45 percent taxable ratio was unreasonable. Despite the fact that a previous survey of the deli's business (***see***, Finding of Fact "6") indicated that taxable sales were 75 percent of total sales, the auditor chose to use a 45 percent taxable ratio. Since petitioner produced no sales or purchase records, bank records or register tapes from which gross or taxable sales of the deli for the audit period could be determined, it cannot be found that the 45 percent taxable ratio was unreasonable. Accordingly, the amount of additional tax determined by the auditor to be due, i.e., $18,573.00, is hereby sustained.

F. Tax Law § 1145(a)(1)(iii) permits abatement of penalties assessed if it is determined that the failure to file a return, pay or pay over the proper amount of tax was due to reasonable cause and not due to willful neglect. Other than a general assertion that all taxes due and owing had been paid, petitioner has produced no evidence to justify his failure to file returns or to pay or pay over the proper amount of tax due and owing. In addition, his personal bankruptcy is of no import to this proceeding. In the first place, the Division was not listed as a creditor on any of the schedules of the petition for bankruptcy and was not notified of the bankruptcy filing or subsequent discharge. However, even if the Division had been listed as a creditor and had been properly served with notice of the bankruptcy proceeding, it is well settled that liability for sales tax, which is required to be collected by a seller from its customers, is governed by the "trust fund" provisions of the Bankruptcy Code and is not dischargeable in bankruptcy (***see***, ***DeChiaro v. New York State Tax Commn.***, 760 F2d 432; 11 USC § 507[a][8][C]; 11 USC § 523[a][1][A]).

G. The petition of Stewart Choo is denied and the Notice of Determination issued to petitioner on October 26, 2000 is sustained in its entirety.

DATED: Troy, New York
June 30, 2005

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE