

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TAMEY WOMBLE	:	
for Review of a Denial, Suspension, Cancellation or	:	DETERMINATION
Revocation of a License, Permit or Registration under	:	DTA NO. 821130
Articles 28 and 29 of the Tax Law.	:	

Petitioner, Tamey Womble, 1165 East 54th Street, #6V, Brooklyn, New York 11234, filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Articles 28 and 29 of the Tax Law.

An expedited hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 5, 2006 at 10:30 A.M. The petition, transmitted in an envelope that had no postmark, was received by the Division of Tax Appeals on May 22, 2006, which date began the 30-day period¹ for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael J. Hall, Esq., of counsel).

¹ Pursuant to Tax Law § 1134(a)(4)(D), "within three months from [the] application for hearing . . . , the commissioner shall issue either a notice of refusal or a certificate of authority." In light of the decision of the Tax Appeals Tribunal in *Matter of Janus Petroleum* (July 11, 1991), the time frame for the administrative law judge to issue a determination is limited to a 30-day period from the application for hearing. This strict time frame is necessary since there is a 30-day period within which either the Division of Taxation or petitioner may take an exception to the administrative law judge's determination, and the Tax Appeals Tribunal, in turn, would have 30 days to issue its decision on review. In this way, the three-month statutory time frame for the commissioner to issue either a notice of refusal or a certificate of authority would be met.

ISSUE

Whether the Division of Taxation properly refused to issue petitioner a certificate of authority to collect sales tax.

FINDINGS OF FACT

1. Petitioner filed an Application for Registration as a Sales Tax Vendor dated April 19, 2006 indicating that she intended to start a business to be known as Down South Café, serving hot and cold food on the premises and as take-out, at a location in Brooklyn. She reported that she “will begin business in New York State” on the same date of her application, i.e., April 19, 2006. She noted that she had purchased an “existing business” and would be operating her business as a sole proprietor. In addition, petitioner responded “yes” to the question “If you withhold or will withhold New York State tax from employees, do you need withholding tax forms or information?” Further, she responded “No” to the following two questions:

- (1) Have you been notified that you owe any New York State tax?
- (2) Do any responsible officers, directors, partners, or employees owe New York State or local sales and use taxes on your behalf, on behalf of another person, or as a vendor of property or services?

2. The Division of Taxation (“Division”) issued a Notice of Proposed Refusal to Issue a Certificate of Authority dated May 1, 2006 checking off the box indicating as follows:

Your current and/or previous business has outstanding liabilities with the New York State Department of Taxation and Finance.

The Division also enclosed with this notice a Consolidated Statement of Tax Liabilities dated April 19, 2006, which listed the following balances due for a period consisting of 17 sales tax quarters:

Tax period ended	Tax assessed	Interest assessed	Penalty assessed	Payments/Credits	Balance Due
11/30/76	\$ 330.56	\$ 8,900.17	\$ 86.64	100.00	\$ 9,217.37
2/28/77	167.76	4,680.55	44.03	-0-	4,892.34
2/28/78	411.04	10,676.18	107.88	-0-	11,195.10
5/31/78	675.60	17,219.45	177.22	-0-	18,072.27
11/30/78	516.16	12,269.77	135.46	100.00	12,821.39
5/31/91	989.84	2,352.02	267.51	725.00	2,884.37
8/31/91	1,008.42	5,151.72	317.49	-0-	6,477.63
11/30/91	707.52	3,487.14	222.69	-0-	4,417.35
2/29/92	571.40	2,717.51	179.90	-0-	3,468.81
8/31/92	762.80	3,370.14	240.09	-0-	4,373.03
11/30/92	585.75	2,494.38	184.30	-0-	3,264.43
2/28/93	543.26	2,230.18	171.03	-0-	2,944.47
5/31/93	465.96	1,841.97	146.52	-0-	2,454.45
8/31/93 ²	1,256.47	4,781.46	395.57	-0-	6,433.50
11/30/93	446.32	1,635.24	140.50	-0-	2,222.06
2/28/94	468.27	1,652.03	147.37	-0-	2,267.67
8/31/94	-0-	-0-	52.50	-0-	52.50
Totals	\$9,907.13	\$85,459.91	\$3,016.70	\$925.00	\$97,458.74

3. The tax liability detailed above was incurred by a Brooklyn grocery store known as Lewis Avenue Grocery, which was owned by petitioner as a sole proprietorship during the 1990s. At the hearing, the Division conceded that petitioner was not liable for the assessments³ for the five sales tax quarters ending in the 1970s. Further, the Division noted its willingness to

² For the sales tax quarter ending August 31, 1993, the consolidated statement of tax liabilities indicated that the return/report had “not been filed.”

³ For each sales tax quarter, a separate assessment was issued by the Division.

cancel penalties including penalty interest asserted due for the remaining 12 sales tax quarters (all during the 1990s). The amounts shown above as “tax assessed” correspond to the amounts of sales and use tax reported as due on the no-remit tax returns filed by petitioner on behalf of the grocery store, except for the amount of \$1,256.47 shown for the period ended August 31, 1993. This larger quarterly amount was an estimate of tax due by the Division since no return had been filed, as noted in footnote “2”. At the hearing, the Division also showed a willingness to negotiate with petitioner concerning this estimate of tax due.

4. Petitioner filed sales and use tax returns in her capacity of “owner” on behalf of Lewis Avenue Grocery for each of the 11 sales tax quarters in the 1990s for which returns were filed but no remittance of tax as shown due was made. As noted in footnote “2”, no return was filed for the quarter ending August 31, 1993, and as noted in Finding of Fact “2”, the sales tax quarters ending 5/31/92 and 5/31/94 are not at issue, presumably because tax was remitted with the filing of the applicable return. The 11 no-remit returns as filed reported “gross sales” and “taxable sales” in the following amounts:

Period Ended	Quarterly gross sales reported	Quarterly Taxable sales reported
5/31/91	\$ 52,164.00	\$11,998.00
8/31/91	59,967.00	13,193.00
11/30/91	38,981.00	8,576.00
2/29/92	31,481.00	6,926.00
8/31/92	No amount indicated	9,246.00
11/30/92	32,274.00	7,100.00
2/28/93	29,930.00	6,585.00
5/31/93	24,557.00	5,648.00
11/30/93	23,522.00	5,410.00

2/28/94	24,680.00	5,676.00
8/31/94	-0-	-0-
Totals	\$317,556.00	\$80,358.00

5. Petitioner, who is employed as a claims processor for a union's benefit fund, has annual wages of approximately \$30,000.00 with overtime. Although she indicated a willingness "to work out an agreement" with the Division, she noted that given her financial circumstances, "there's not much I can do right now" with monthly living expenses of approximately \$1,600.00 and credit card debt outstanding of approximately \$7,000.00. Further, according to petitioner, she agreed to serve as the "owner" of the grocery store in order to "have a job" at the request of a certain, unidentified man who "hasn't helped me with a dime" in paying outstanding tax liabilities of the grocery store. According to petitioner, she has already paid outstanding Federal taxes owed by the grocery store of approximately \$14,000.00, and since she "didn't really own the business" does not feel obligated to pay the grocery store's outstanding sales tax as detailed above.

CONCLUSIONS OF LAW

A. Tax Law § 1134(a)(4)(B) provides in relevant part as follows:

Where a person files a certificate of registration for a certificate of authority [to collect sales tax] and in considering such application the commissioner ascertains that (i) any tax imposed under this chapter . . . has been finally determined to be due from such person and has not been paid in full . . ., the commissioner may refuse to issue a certificate of authority.

Therefore, the pivotal question to be answered is whether sales taxes which have been finally determined to be due from petitioner remain unpaid so that the commissioner may refuse to issue her a certificate of authority for purposes of the Brooklyn café petitioner now seeks to operate.

B. In answering this question, it must first be determined whether petitioner was a person required to collect sales tax on behalf of Lewis Avenue Grocery. Tax Law § 1131(1) defines “persons required to collect [sales tax]” in a very broad fashion as follows:

[E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any 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. (Emphasis added.)

In turn, Tax Law § 1133(a) makes “every person required to collect any tax” *personally liable* for sales tax required to be collected. This statutory framework creates an expansive scope for holding individuals liable for sales tax which should have been collected and paid over to the State.

C. Beyond any doubt, an individual who conducts business as a sole proprietorship is a “person required to collect sales tax.” Here, the Division has introduced evidence to support the conclusion that petitioner operated the grocery store as the owner and sole proprietor. Petitioner has offered some vague testimony to support her contention that she was operating as merely a “front” at the request of an unidentified man. But even assuming that sufficient weight could be given to such testimony to overcome the Division’s evidence, petitioner as an “*employee* of an individual proprietorship” would still be a “person required to collect sales tax” in the circumstances at hand. By holding herself out to the State as the owner, she assumed “a duty to act” for the individual proprietorship in ensuring its compliance with the Tax Law.

Consequently, even if petitioner had shouldered her burden of proving she was merely an employee, by acting as a front for the proprietorship and misleading the Division of Taxation, she would still be a “person required to collect sales tax” on behalf of the grocery store.

D. This result may seem severe to petitioner who has an entrepreneurial spirit, reflected by her desire to operate a café, which should be commended. Nonetheless, the sales tax is a tax which a vendor is *entrusted* to collect on behalf of the State. Tax Law § 1132(a)(1) provides specifically that sales tax “shall be paid to the person required to collect it, *as trustee for* and on account of the state” (emphasis added). In fact, sales tax is governed by the “trust fund” provisions of the Bankruptcy Code and is not dischargeable in bankruptcy (*see, Matter of Milne*, Tax Appeals Tribunal, February 17, 2005). As a result, the provisions of the Tax Law, as detailed in Conclusion of Law “B” are expansive with regard to imposing personal liability on a broad range of persons to ensure that these taxes *collected in trust* are paid over to the State.

E. Furthermore, although another individual might also be responsible for the collection and remittance of Lewis Avenue Grocery’s sales tax, petitioner’s responsibility for the collection and remittance of such tax remains intact because the liability of “persons required to collect sales tax” is joint and several so that the Division of Taxation may seek the entire tax owed from any one person (*see, Matter of Risoli v. Commissioner of Taxation and Finance*, 237 AD2d 675, 654 NYS2d 218; *Matter of Tafeen*, Tax Appeals Tribunal, January 3, 2002). It would be petitioner’s option to seek recompense, if possible, from the unidentified man whom she considers the true owner of the grocery. If not possible, petitioner has been forced to learn an unfortunate lesson not to serve as someone’s front to mislead a governmental agency. Nonetheless, as indicated in Finding of Fact “3”, the Division has shown a willingness to ease some of the burden by agreeing to cancel penalties and to negotiate with petitioner concerning the estimate of tax due for one of the quarters at issue as well as to negotiate a payment schedule, and perhaps petitioner will still find a way to go forward with her Down South Café.

E. In sum, the record establishes that Lewis Avenue Grocery has failed to pay its sales tax due as detailed in Finding of Fact “4”. Further, the Division has also established that petitioner filed sales tax returns as owner of the grocery store with no remittance of taxes shown due on the returns. Consequently, it is concluded that the issuance of a Notice of Proposed Refusal to Issue a Certificate of Authority by the Division of Taxation against petitioner was reasonable.

F. The petition of Tamey Womble is denied, and the Notice of Proposed Refusal to Issue a Certificate of Authority dated May 1, 2006 is sustained.

DATED: Troy, New York
June 20, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE