

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
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PHILIP COSTA	:	DECISION
OFFICER OF TOWN HOUSE RESTAURANT	:	
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, 1981	:	
through February 28, 1983.	:	

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Petitioner, Philip Costa, Officer of Town House Restaurant, 211 Phillies Bridge Road, New Paltz, New York 12561, 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, 1981 through February 28, 1983 (File No. 45835).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on October 9, 1985 at 9:15 A.M., with all briefs to be submitted by December 11, 1985. Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether the State Tax Commission has jurisdiction to determine the sales tax liability of petitioner for the period March 1, 1981 through May 31, 1981.

II. Whether, for the period June 1, 1981 through February 28, 1983, petitioner was a person required to collect sales tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

FINDINGS OF FACT

1. For the period March 1, 1981 through May 31, 1981, M.T. & K.D. Enterprises, Inc. (hereinafter "the corporation") filed a New York State and local sales and use tax return with a check for the amount of tax shown on said return to be due. Subsequently, it was determined that there were insufficient funds to cover the check. On May 18, 1983, a Notice and Demand for Payment of Sales and Use Taxes Due was issued to Philip Costa (hereinafter "petitioner"), officer of the corporation doing business as Town House Restaurant, in the amount of \$5,713.65, plus penalty of \$1,428.41 and interest of \$1,457.54, for a total amount due of \$8,599.60.

2. For the period June 1, 1981 through February 28, 1983, the corporation filed no sales and use tax returns. On May 18, 1983, the Audit Division issued to petitioner as an officer of the corporation, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the aforesaid period in the amount of \$49,994.42, plus penalty of \$3,428.16 and interest of \$1,303.43, for a total amount due of \$54,726.01. The said Notice of Determination and Demand contained the following explanation:

"You are personally liable as officer of M.T. & K.D. Enterprises, Inc. d/b/a Town House Restaurant under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

3. Prior to the formation of the corporation, petitioner and George Kent, Jr. were partners in the oil business as owners of Cornwall Oil Company and Beutefish Oil Company. In 1980, Kent suggested that petitioner invest with him in the purchase of a restaurant known as the Town House Restaurant which was located in Newburgh, New York. The corporation was formed for the sole purpose of acquiring and operating this restaurant. Petitioner invested approximately \$8,000.00 to \$10,000.00 and, in return for such investment, became the

Vice-President and Secretary of the corporation and owner of 50 shares of common stock in the corporation representing a 50 percent ownership of corporate stock. In September of 1980, the corporation purchased the Town House Restaurant.

4. Kent was the chief operator of the Town House Restaurant. Petitioner did not work in the restaurant. Kent's accountant, Joseph Scalla, was charged with the preparation of the corporation's tax returns and Kent kept the corporate books. After a few months of owning the restaurant, petitioner became convinced that it would not be an adequate income producer and thereupon attempted to get Kent to sell it. Petitioner had two or three potential buyers, but Kent refused to sell the restaurant. When petitioner discovered that Kent had not been honest with him in some of their oil business dealings, petitioner decided to sign over his 50 shares of stock to Kent and resign from his position as Vice-President and Secretary of the corporation. In late March of 1981, petitioner transferred his 50 shares of corporate stock to Kent and signed a statement of resignation. Both the stock transfer and the statement of resignation bore the date December 31, 1980, but were actually signed in March, 1981.

5. On March 3, 1981, petitioner, along with George Kent, Jr. signed a corporate resolution on behalf of the corporation which designated The First National Bank of Highland, Highland, New York as a depository of the corporation. One of the oil companies in which petitioner and Kent were partners had previously opened an account with The First National Bank of Highland and Kent recommended to petitioner that the restaurant account be transferred to the same bank. Petitioner recalls having signed only one check drawn on The First National Bank of Highland account which check was signed by petitioner to pay the attorneys who had represented petitioner and Kent in setting up the corporation.

6. Petitioner received no income from the corporation and received nothing from Kent when he transferred his corporate stock to Kent in March, 1981. Petitioner never signed a payroll check for any of the employees of the corporation nor did he sign any invoices from corporate suppliers.

CONCLUSIONS OF LAW

A. That where timely and correct returns are submitted, lacking only the remittance of tax shown as due thereon, the issuance of a Notice and Demand is not statutorily authorized and this Commission is thus not empowered to administratively determine petitioner's liability for the unpaid taxes at issue. Parsons v. State Tax Commission, 34 N.Y.2d 190. Notwithstanding the enactment of Tax Law section 171, paragraph twenty-first (L. 1979, Ch. 714, eff. January 1, 1980), the Tax Law does not confer administrative jurisdiction on the Tax Commission to recover unpaid taxes where correct returns have been filed. Hall v. New York State Tax Commission, 108 A.D.2d 488, 489 N.Y.S.2d 787. Finally, it should be noted that section 1138(a) of the Tax Law has been amended, effective April 17, 1985 (L. 1985, Ch. 65), such that under the facts presented herein, the issuance of a Notice of Determination and Demand would be authorized and the State Tax Commission would have jurisdiction to determine petitioner's liability.

B. That with respect to the period March 1, 1981 through May 31, 1981, where returns were filed lacking the remittance of tax shown as due, this Commission does not have the authority to administratively determine petitioner's liability. With respect to the period June 1, 1981 through February 28, 1983, however, no return was filed and the Tax Commission is authorized under section 1138(a) of the Tax Law to administratively determine the tax liability under such circumstances.

C. That section 1133(a) of the Tax Law provides, in part, that every person required to collect the taxes imposed under Article 28 of the Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Section 1131(1) of the Tax Law defines "(p)ersons required to collect tax" as used in section 1133(a) to include any officer or employee of a corporation, or a dissolved corporation, who as such officer or employee is under a duty to act for the corporation in complying with any requirement of Article 28 of the Tax Law.

D. That the determination of whether an individual is a person or officer under a duty to act for the corporation is based upon the facts presented (Vogel v. New York State Department of Taxation and Finance, 98 Misc.2d 222). The relevant factors include, but are not limited to: the individual's daily involvement in the corporation; the individual's participation and involvement in the financial affairs of the corporation; the individual who prepared and signed the sales and use tax returns; the individual's authority to draft checks on the firm's bank account; and, in the case of a closely-held corporation, the individual's knowledge of the affairs of the firm and benefits from the firm's profits (Matter of Robert Gattie, State Tax Commission, September 5, 1980).

E. That for the period June 1, 1981 through February 28, 1983, petitioner was not a person under a duty to collect sales and use taxes for the corporation. Petitioner had no involvement with the business of the corporation other than that of a stockholder before March, 1981 and after such date, had no investment in the corporation. He did not prepare nor sign any of the corporation's tax returns. He did not maintain the corporation's books or sign payroll checks or suppliers' invoices. Petitioner realized no income from the operation

of the restaurant by the corporation and received no consideration from his business partner, George Kent, Jr., when he transferred his stock to Kent.

F. That the petition of Philip Costa, Officer of Town House Restaurant, is granted to the extent indicated in Conclusions of Law "B" and "E" and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 18, 1983 for the period June 1, 1981 through February 28, 1983 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1986

Rodrigue W. Allen  
PRESIDENT

Francis Q. Kolmij  
COMMISSIONER

[Signature]  
COMMISSIONER