

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

SHIN HWAN KWON,

OFFICER OF

NEUKO TRADING CORPORATION

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DECISION

for Revision of a Determination or for Refund  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Periods March 1, 1981  
through May 31, 1981 and September 1, 1982  
through November 30, 1983.

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Petitioner, Shin Hwan Kwon, officer of Neuko Trading Corporation, 39-60  
54th Street, #3A, Woodside, New York 11377, 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 periods March 1, 1981 through May 31, 1981 and September 1,  
1982 through November 30, 1983 (File No. 55881).

A hearing was held before Allen Caplowaith, Hearing Officer, at the  
offices of the State Tax Commission, Two World Trade Center, New York, New  
York, on March 11, 1987 at 10:45 A.M., with all briefs to be submitted by  
April 8, 1987. Petitioner appeared by Julian Barnett, CPA. The Audit Division  
appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

#### ISSUE

Whether petitioner **is** personally liable for payment of sales taxes  
determined to be due from Neuko Trading Corporation d/b/a House of Capri.

FINDINGS OF FACT

1. (a) On July 6, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Shin Hwan Kwon, as an officer of Neuko Trading Corporation d/b/a House of Capri. Said notice asserted a base tax due of \$27,103.50, plus penalty of \$2,773.73 and interest of \$1,385.15, for a total due of \$31,262.38. The amounts asserted for each specific quarter at issue were stated on said notice as follows:

<u>"Period Ending</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
5/31/81	\$ -0-	\$1,039.13	\$805.76
11/30/82	5,420.70	325.24	114.27
2/28/83	5,420.70	325.24	101.58
5/31/83	5,420.70	325.24	101.58
8/31/83	5,420.70	379.44	139.00
11/30/83	5,420.70	379.44	122.96"

The amounts of tax due were estimated by the Audit Division for all the above periods except the period ended May 31, 1981.

(b) The aforesaid notice also contained the following explanation:

"The tax assessed herein has been estimated and/or determined to be due in accordance with the provisions of section 1138 of the Tax Law.. ..

You are liable individually and as officer of House of Capri - Neuko Trading Corporation, 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.

The maount [sic] of the liability reflects any payments applied to the corporate assessments."

2. In his perfected petition, Shin Hwan Kwon (hereinafter "petitioner") alleged that a reduced base tax was due as follows:

"Qtr. Ended

5/31/81	No Tax Due
11/30/82	Tax Due \$3,488.16 less paid \$1,500. Balance due \$1,988.16
2/29/83	Tax Due \$3,797.06 less paid \$1,500. Balance due \$2,297.06
5/3/83 <sup>1</sup>	No Tax Due - out of business
8/31/83	No Tax Due - out of business
11/30/83	No Tax Due - out of business"

3. Neuko Trading Corporation d/b/a House of Capri (hereinafter "Neuko") was engaged in business as a restaurant making sales of food subject to tax. Petitioner was the president **of** Neuko.

4. Petitioner alleged in his petition that he ceased doing business in July 1983. However, he testified at the hearing that he ceased doing business on May 28, 1983. He further testified that the business was incurring losses and the landlord refused to renew his lease. Accordingly, he closed the restaurant and abandoned all his furniture, fixtures and equipment.

5. Neuko failed to timely file a sales tax return and timely pay the tax due for the period ending May 31, 1981. Accordingly, Neuko became liable for penalties and interest.

6. Petitioner submitted copies of the sales tax returns filed for the periods ending November 30, 1982 and February 28, 1983. The amounts due according to said returns were \$3,488.16 and \$3,797.06, respectively.

7. Petitioner alleged that three previous payments of \$1,500.00 each were made to the Sales Tax Bureau in partial payment **of** the amounts at issue herein.

8. Subsequent to the hearing, Mr. Allen Mark, Senior Tax Compliance Agent, performed an analysis of amounts currently due. According to his letter of March 17, 1987, the balances due on Neuko's account through February 1983 are as follows:

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<sup>1</sup> Appears to be a typographical error, should be quarter ended 5/31/83.

<u>"Assessment</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Paid</u>	<u>Balance</u>
D8110177662	3/81-5/81	4336.56	1039.13	1434.12	4500.00	2309.81
D8302215373	9/82-11/82	3488.16	872.04	2335.01	--	6695.21
D8305230221	12/82-2/83	3797.06	949.27	2352.39	--	7098.72

Checks 1231, 1254 and 1289 [of \$1,500.00 each] were applied to D8110177662."

9. Petitioner submitted a copy of the tax return filed for the quarter ended May 31, 1983. Said return, which was marked final return, shows a tax due of \$3,485.63.

10. No documentation was submitted to show the actual date that petitioner ceased doing business.

11. Petitioner did not deny that he was a person required to collect tax on behalf of Neuko.

#### CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section 1131(1) furnishes the following definition for the term "persons required to collect tax":

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every 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 or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

B. That petitioner was a person required to collect the sales tax of Neuko for the periods at issue. Accordingly, he is personally liable, pursuant to Tax Law §§ 1131(1) and 1133(a), for payment of said sales tax.

C. That section 1138(a) of the Tax Law provides, in pertinent part, that:

"If a return required by this article is not filed, or if a return when filed **is** incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices".

D. That the base tax due for the periods at issue **is** recomputed as follows:

<u>Period Ended</u>	<u>Tax Due</u>
May 31, 1981	\$ -0-
November 30, 1982	3,488.16
February 28, 1983	3,797.06
May 31, 1983	3,485.63
August 31, 1983	3,590.28
November 30, 1983	<u>3,590.28</u>
Total Tax Due	<u>\$17,951.41</u>


The tax determined for the periods ended August 31, 1983 and November 30, 1983 has been estimated based on the average of the taxes due for the three prior periods.

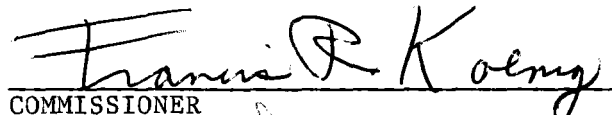
E. That the petition of Shin Hwan Kwon, officer of Neuko Trading Corporation, **is** granted to the extent provided in Conclusion of Law "D", supra; that the Audit Division **is** directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated July 6, 1984 accordingly; and that, except *as so* granted, said petition **is** in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 01 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER