

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
EUGENE BOISSIERE	:	
AND	:	
JASON KRYSTAL	:	DETERMINATION
	:	DTA NOS. 824467,
	:	824937 AND 824938
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period September 1, 2007 through	:	
May 31, 2009.	:	

Petitioners, Eugene Boissiere and Jason Krystal, 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 September 1, 2007 through May 31, 2009.

On September 16, 2013, petitioners, by Hodgson Russ LLP (Timothy P. Noonan, Esq., of counsel), and the Division of Taxation, by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by March 24, 2014, which date began the six-month period for the issuance of this determination. After a review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners were persons required to collect sales tax on behalf of Ask 244, LLC, pursuant to Tax Law § 1131(1) and § 1133(a).

FINDINGS OF FACT

1. Ask 244, LLC (the LLC) is a limited liability company that was assessed sales and use tax for the period June 1, 2004 through May 31, 2009 in the amount of \$735,899.91 plus interest.

2. Petitioners, Eugene Boissiere and Jason Krystal, held membership interests in the LLC of 14.9044% and 13.522%, respectively.

3. The Division of Taxation (Division) issued a Notice of Determination, dated November 15, 2010, to petitioner Eugene Boissiere that assessed sales and use taxes for the period September 1, 2007 through May 31, 2009 in the amount of \$251,647.90 plus penalty and interest for a balance due of \$429,014.06. On the same date, the Division issued a Notice of Determination to petitioner Jason Krystal that assessed the same amount of tax, penalty and interest, over the same period of time, as had been assessed against Eugene Boissiere. Petitioners were assessed as persons required to collect tax on behalf of the LLC pursuant to Tax Law § 1133, solely as a result of their status as members of the LLC.

4. On the basis of negotiations between petitioners and the Division, petitioners' liabilities have been reduced to reflect their ownership in the business: Jason Krystal's liability has been reduced \$18,510.42 plus applicable interest and Eugene Boissiere's liability has been reduced to \$20,202.81 plus applicable interest.

5. Neither petitioner had managerial responsibility, the ability to hire and fire employees, knowledge of or control over the LLC's financial affairs, nor did either petitioner have the authority to sign the LLC's tax returns.

6. Petitioners did not participate in the audit or the LLC and do not know the basis of how the tax was computed.

7. In accordance with State Administrative Procedure Act § 307(1), petitioners' proposed findings of fact have been generally accepted and incorporated herein. It is noted that many of the proposed findings of fact correspond with a Stipulation of Facts executed by the parties. Additional findings of fact were also made.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioners are not disputing the amount of the assessment. However, they are disputing their status as responsible persons under Tax Law § 1133. Petitioners submit that in 1994 the Tax Law was amended to include "any member of a limited liability company" (Tax Law § 1131[1]) in the group of individuals considered as a responsible officer. According to petitioners, this creates a contradiction because the purpose of forming an LLC is to provide members with limited liability yet Tax Law § 1131(1) allegedly creates unlimited liability. Petitioners posit that the unlimited liability of Tax Law § 1131(1) cannot be reconciled with the Limited Liability Company Law's member liability provisions and violates their due process rights. Petitioners note that under the Limited Liability Company Law, a member of a Limited Liability Company cannot be held personally liable for the LLC's obligations "solely based on their status as members" (Limited Liability Company Law § 609[a]). In a reply brief, petitioners note that while the definition of partnership and partner in Tax Law § 2(6) includes a limited liability company or a member thereof, the definition contains the caveat of "unless the context requires otherwise." Petitioners posit that in view of the contradiction between the Tax Law and the Limited Liability Company Law, the context requires otherwise.

9. The Division contends that members of an LLC are subject to liability for the taxes of that entity. According to the Division, since petitioners concede that they were members of the

LLC and that, based on their respective ownership interests, the amounts asserted against them are correct, there is no issue remaining to be determined by the Division of Tax Appeals.

CONCLUSIONS OF LAW

A. A limited liability corporation is defined in the Tax Law as a “domestic limited liability company or a foreign limited liability company, as defined in section one hundred two of the limited liability law, a limited liability investment company formed pursuant to . . . the banking law, or a limited liability trust company formed pursuant to . . . the banking law” (Tax Law § 2[5]). This section further provides that, unless the context requires otherwise, the terms “partnership and partner” includes a limited liability company and a member thereof, respectively (Tax Law § 2[6]). It follows from foregoing sections that a company formed as a limited liability company pursuant to the Limited Liability Company Law or the Banking Law is treated by the Tax Law as a partnership (*Matter of Santo*, Tax Appeals Tribunal, December 23, 2009).

B. Tax Law § 1133(a) provides that “every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected, or required to be collected under this article. . . .” Tax Law § 1131(1) defines “persons required to collect [sales] tax,” to include every vendor of tangible personal property or services, and:

[s]hall also include any officer, director or employee of a corporation . . . , any employee of a partnership, any employee or manager of a limited liability company . . . who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company . . . in complying with any requirement of this article; *and any member of a partnership or limited liability company* (emphasis added).

C. On the basis of the forgoing provisions, the Tax Appeals Tribunal concluded in *Santo* that Tax Law § 1131(1) imposes strict liability upon members of a partnership or limited liability

company. According to the Tribunal, liability is automatically imposed once the Division establishes a taxpayer's status as a member.

D. Petitioners' claim for relief is based on the proposition that there is a conflict because the Limited Liability Company Law was intended to provide a mechanism to limit liability while Tax Law § 1131(1) creates unlimited liability. This argument does not coincide with the facts of this case. Rather, petitioners' liability was strictly limited to the percentage of their ownership of the LLC.¹ Moreover, the parties stipulated that petitioners were members of a limited liability company. Having chosen to proceed as members of an LLC, petitioners must accept the consequences of their choice of business organization. Under the circumstances, petitioners have not established that their right to due process has been abridged. Finally, it is noted that the provisions of Tax Law § 1131(1) and § 1133(a) are clear and unambiguous and an administrative agency is not at liberty to ignore these statutory requirements (*Matter of Golub Corporation v. New York State Tax Appeals Tribunal*, 116 AD3d 1261 [3d Dept 2014]).

E. The petitions of Eugene Boissiere and Jason Krystal are denied and the notices of determination dated November 15, 2010, as adjusted per Finding of Fact 4, are sustained together with such interest as may be lawfully due.

DATED: Albany, New York
September 18, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

¹ It appears that the reduction in liability was granted pursuant to a policy of the Division to provide relief to members of LLC's whose situation satisfies certain criteria (TSB-M-11[17]S).