

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MAURICE BITTON</b>	:	DETERMINATION
	:	DTA NO. 827184
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, 2007 through	:	
November 30, 2009.	:	

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Petitioner, Maurice Bitton, 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, 2007 through November 30, 2009.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on February 1, 2017 at 10:30 A.M., in New York, New York, with all briefs to be submitted by October 19, 2017, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Linda Farrington, Esq., of counsel).

***ISSUE***

Whether petitioner was properly determined to be a person under a duty to collect and remit sales and use taxes on behalf of Le Cave, LLC, pursuant to Tax Law §§ 1131 (1) and 1133 (a).

***FINDINGS OF FACT***

The parties entered into a Stipulation of Facts, with attached exhibits. The Stipulation of

Facts and attached exhibits have been incorporated into the following findings of fact.

1. In 1999, petitioner, Maurice Bitton, obtained a 10-year lease for the premises located at 64 East First Street, New York, New York, a 3,200 to 3,500 square foot one-story building. The record does not include a copy of the lease. However, petitioner testified that the rental terms were very favorable and included two five-year renewal clauses.

2. Between 1999 and 2006, petitioner operated a number of restaurants at the East First Street location. The first, named Chabada, was operated with an unnamed partner, but that partnership did not last. Next, petitioner partnered with Brian McNally to operate a restaurant named Smith. However, Mr. McNally closed the restaurant within a few months of its opening. Mr. Bitton then partnered with Brian, the former manager of Smith, to operate a restaurant named Star Foods for an undisclosed period of time. Thereafter, petitioner operated Star 64 at the East First Street location.

3. On October 2, 2002, Le Cave, LLC (LeCave), a limited liability company, began doing business at the East First Street location. The record does not include LeCave's limited liability company operating agreement. However, documents in the record indicate that petitioner was a member of LeCave, as of October 2, 2002.

4. Since birth, petitioner has had Familial Mediterranean Fever, a chronic medical condition where he endures severe abdominal pain and high fevers. In a letter, dated October 21, 2014, petitioner's gastroenterologist, William H. Perlow, M.D., stated that petitioner "requires [medication] to control his Mediterranean Fever. Each episode could last several days depending upon the pain and fever during which time he cannot go to work." Dr. Perlow, in his letter, also stated that on May 2, 2006, he "diagnosed a malignancy of [petitioner's] right kidney which required removal. [Petitioner] is closely monitored with CT scans and kidney function tests."

5. Around the time of his surgery in May 2006, petitioner partnered with Patrice Bihina-Parade<sup>1</sup> to run the restaurant. According to petitioner, Mr. Bihina-Parade contributed approximately \$250,000.00 to renovate the interior of the East First Street location.<sup>2</sup> The concept of a restaurant and lounge was Mr. Bihina-Parade's idea. The restaurant remained closed while the renovations took place.

6. On or about September 26, 2006, petitioner and Mr. Bihina-Parade, operating as LeCave, reopened the restaurant under the name Boucarou Lounge. "American Mediterranean" food was served at the restaurant. Music was provided by live performers and disc jockeys (DJs) on a regular basis.

7. According to petitioner, Mr. Bihina-Parade was the general manager of the restaurant, and was present from 4:00 P.M. or 5:00 P.M. until closing every day the restaurant was open. As general manager, Mr. Bihina-Parade oversaw all the daily activities of the restaurant, including, among other things, hiring, firing and supervising its employees; determining the menu; and purchasing the food and alcoholic beverages. Mr. Bihina-Parade also provided live music and DJ services through a separate company that he owned.

8. Petitioner testified that he was not actively involved in the business at all times, but he conceded that he had the authority to sign checks and that he received correspondence from creditors. Petitioner admitted that he would go to the restaurant in the daytime, where he would receive food and beverage deliveries, and sign checks. He also acknowledged that the lease continued to be in his name, and that his name was listed as a principal on LeCave's on-premises

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<sup>1</sup> Mr. Bihina-Parade is also referred to as Patrice Bihina in documents in the record.

<sup>2</sup> On an unknown date in 2006, Life for Life Entertainment, LLC (Life for Life), received 300,000 units representing a 50% membership interest in LeCave. It appears Mr. Bihina-Parade was the sole member of Life for Life.

New York State liquor license from January 27, 2003 through February 28, 2011.

9. In 2008 or 2009, petitioner renewed the lease for an additional five years.

10. At some point in 2009, LeCave began having issues paying its bills. By June 2009 or July 2009, vendors were pursuing collection from LeCave, petitioner, and Mr. Bihina-Parade. At that point, petitioner told Mr. Bihina-Parade that their relationship was no longer working and he wanted to find a different partner.

11. The record includes a copy of the Division's Alcoholic Beverages Floor Tax Return - Beer and Wine, form MT-70-MN, hand-dated and signed by Mr. Bihina-Parade, as managing partner, on July 18, 2009.<sup>3</sup> Beer and wine inventory tax in the total amount of \$7.37 was computed as due on this floor tax return.

12. By an agreement dated September 10, 2009,<sup>4</sup> Life for Life sold its 50% membership interest in LeCave to Tomer Chazbani for \$140,000.00. In addition to the purchase price, Mr. Chazbani agreed to pay up to \$60,000.00 for certain enumerated debts of LeCave. Article 1, section 1.3 (f) of this agreement provided that "Maurice Bitton and Patrice Bihina-Parade agree to be jointly responsible for any Tax, Sales Tax or any legal action for the period September 26 2006 to August 10 2009."<sup>5</sup> After Life to Life's sale of its membership interest in LeCave, petitioner's membership interest in LeCave remained 50%.

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<sup>3</sup> The name of the entity filing the form MT-70-MN is blocked out by a copy of a money order receipt for \$7.37 at the top of the form. However, it was confirmed at the hearing that LeCave's employer identification and New York State Liquor Authority (SLA) license numbers were the listed numbers on the copy of the floor tax return submitted into the record.

<sup>4</sup> The agreement was by and between Life for Life, Tomer Chazbani, and LeCave. Mr. Bihina-Parade executed this agreement as member of Life for Life. Petitioner also executed this agreement as a member of LeCave.

<sup>5</sup> Item 1 of the stipulation of facts incorrectly stated that "[d]uring the tax periods ended 11/30/2007 - 11/30/2009 LeCave LLC was jointly owned by Maurice Bitton and Patrice Biahina [sic]. Patrice Biahina [sic] and Maurice Bitton each owned one-half of LeCave LLC during this entire period." Findings of fact 5 and 12 accurately reflect Life for Life's membership interest in LeCave and the date of sale of the same.

13. In accordance with Article IV, section 4.2 of the agreement, LeCave ceased using the name Boucarou Lounge as of October 1, 2009.

14. On November 12, 2009, LeCave's Application to Renew Sales Tax Certificate of Authority, form DTF-17-R, was electronically submitted by petitioner.<sup>6</sup> The application contained, among other things, the following information about LeCave:

- a) its "DBA or trade name" was Star Foods Restaurant;
- b) its physical business address was East First Street, New York, New York;
- c) its mailing address was petitioner's New York, New York, home address;
- d) it was a limited liability company;
- e) it was licensed by the SLA, and its SLA license number was provided;
- f) Roy A. Herbert was its tax preparer, and his address, telephone and fax numbers, and preparer federal EIN were provided; and
- g) Maurice Bitton, member, was listed as the responsible person, effective October 2, 2002.

15. According to petitioner, Mr. Chazbani was simply an investor who agreed to help petitioner pay off outstanding liabilities until he could find a new partner. At some point, Mr. Chazbani sold his 50% membership interest in LeCave to Mohammed Elsayed and Issa Abdullah. The record does not include any documents related to the sale of Mr. Chazbani's membership interest in LeCave.

16. At some point, petitioner extended the lease for the East First Street location to 2019. The lease continued to be in petitioner's name.

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<sup>6</sup> This application bore a notice date of September 8, 2009.

17. After Messrs. Elsayed and Abdullah became members of LeCave, they renovated the interior of the restaurant. On or about May 12, 2010, LeCave began doing business as LeVie, a restaurant serving Mediterranean food, in the East First Street location. Over time, Messrs. Elsayed and Abdullah incorporated a hookah lounge into the restaurant.

18. Within a short period of time after the May 2010 opening, certain differences arose between petitioner and Messrs. Elsayed and Abdullah. To settle those differences, petitioner agreed to sell his 50% membership interest in LeCave to Messrs. Elsayed and Abdullah. By agreement dated October 15, 2010, by and between petitioner, Mr. Elsayed, Mr. Abdullah and LeCave, petitioner agreed to sell his 50% membership interest in LeCave for the total sum of \$425,000.00 to be paid as follows:

“(a) \$100,000.00 upon execution of this Agreement; and

(b) \$100,000.00 to be paid at closing; and

(c) \$225,000.00 to be paid in consecutive equal monthly installments of \$7,154.94, inclusive of interest at 9% per annum, commencing November 15, 2010, to be evidenced by a Negotiable Installment Promissory Note, Security Agreement and Uniform Commercial Code Financing Statement to be executed at closing.”

19. Upon execution of the agreement on October 15, 2010, Mr. Abdullah paid petitioner \$50,000.00 by check drawn on Issa Abdullah, Esq.’s IOLA Account at JP Morgan Chase Bank, N.A. (JP Morgan), and Mr. Elsayed paid petitioner \$50,000.00 by check drawn on Elsayed III Corp.’s JP Morgan business plus account. Petitioner testified that he used the \$100,000.00 to pay LeCave’s unidentified debts.

20. Although the agreement required them to pay \$100,000.00 to petitioner at closing, Messrs. Elsayed and Abdullah never paid the \$100,000.00. Documents in the record also indicate that the promissory note, and security agreement were never executed. However, it

appears that Messrs. Elsayed and Abdullah have made a total of 26 payments, each in the amount of \$7,154.94.<sup>7</sup>

21. After October 15, 2010, Messrs. Elsayed and Abdullah continued to use LeCave's SLA license that was under petitioner's name. Messrs. Elsayed and Abdullah were unable to get a liquor license in their names as owners of LeCave due to the numerous violations that took place either inside or outside the restaurant on various dates in 2011. As a result of those repeated violations, the SLA revoked LeCave's liquor license, on which petitioner was listed as a principal, "effective 2/28/11 per Full Board decision on 11/20/12." As a result that revocation, the SLA denied petitioner's application for a liquor license on January 11, 2013.

22. On July 22, 2010, the Division of Taxation (Division) assigned Wendy A. Layton, then a Tax Technician Trainee I in the Division's Transaction Desk Audit Bureau Casual Sales Desk Audit Unit,<sup>8</sup> to perform a sales and use tax audit of Le Cave for the period September 1, 2007 through November 30, 2009. To conduct the audit, Ms. Layton compared the gross receipts reported on LeCave's federal partnership tax returns for tax years 2007, 2008 and 2009 to the sales reported on its sales tax returns for the corresponding sales tax filing periods. As a result of that comparison, the auditor found that the sales reported on the sales tax returns were significantly less than the gross receipts reported on LeCave's partnership tax returns. The auditor determined additional tax due in the amount of \$121,543.43 for the period September 1, 2007 through November 30, 2009. In determining the additional tax due, the auditor calculated

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<sup>7</sup> Because Messrs. Elsayed and Abdullah failed to pay the \$100,000.00 due at closing and made only sporadic \$7,154.94 payments, petitioner, on or about November 9, 2011, commenced a lawsuit, *Maurice Bitton v Mohammed Elsayed, Issa Abdullah and LeCave LLC d/b/a La Vie* [sic], Index No. 2592/11 (Kings County Supreme Court). The record includes some of the motion papers filed in that lawsuit. The ultimate disposition of the lawsuit is not part of the record.

<sup>8</sup> Ms. Layton is currently a Tax Technician II in the Division's Refund Unit.

the difference between the sales amounts reported for federal purposes and New York State sales tax purposes.

23. As a result of its audit, the Division issued to LeCave a statement of proposed audit change for sales and use tax, dated October 14, 2010, which asserted additional tax due in the amount of \$121,543.43 for the period September 1, 2007 through November 30, 2009, plus applicable interest. There was no penalty assessed.

24. During the course of the audit, Ms. Layton dealt primarily with LeCave's power of attorney, Roy A. Herbert, CPA. After discussions with the auditor, Mr. Herbert agreed to the amount of the audit findings, and they discussed a six month payment plan.

25. On October 21, 2010, Mr. Herbert, as LeCave's authorized representative, executed a consent fixing the tax due in accordance with the amounts asserted in the statement of proposed audit change. Mr. Herbert faxed a signed copy of the statement of proposed audit change to the auditor in October 2010. Petitioner testified that he did not recall the audit, but he admitted receiving a copy of the statement of proposed audit change that was issued to LeCave. At the hearing, petitioner stated that he agrees LeCave owes sales and use taxes for the period September 1, 2007 through November 30, 2009, and he is not challenging the underlying audit amount.

26. In response to the signed statement of proposed audit change, the auditor sent a letter, dated October 29, 2010, to LeCave advising that the Division would accept the six month payment plan previously discussed. The letter provided the following payment schedule: \$28,000.00 due November 15, 2010; \$23,000.00 due December 15, 2010; \$23,000.00 due January 15, 2011; \$23,000.00 due February 15, 2011; \$23,000.00 due March 15, 2011; and \$22,264.71 due April 15, 2011. The letter also advised that if payments were not received when



due, the balance would be assessed and interest would then begin to accrue on the remaining balance.

27. Petitioner sent a letter, dated January 24, 2011, to the auditor. In that letter, petitioner stated that he was aware of LeCave's tax issue, and he knew that Ms. Layton had received "a few correspondences" from his accountant Roy Herbert and his attorney Norman Langer. He further stated that he had a 50% partner during the tax period in question, that was Mr. Bihina. In this letter, petitioner claimed, among other things, that when Mr. Bihina left the company he signed an agreement that he would be responsible for any sales taxes that should arise between 2006 and August 2009. Petitioner provided the name and address of Mr. Bihina's new restaurant in the letter, and attached a copy of the September 10, 2009 agreement by and between Life for Life, Mr. Chazbani and LeCave (*see* finding of fact 12) to the same.

28. As a result of its failure to make any of the scheduled payments, the Division issued to LeCave a notice and demand for payment of tax due (assessment L-035383183), on January 31, 2011, assessing tax in the amount of \$121,543.43 plus interest in the amount of \$23,080.95 for a current balance due of \$144,624.38.

29. The auditor determined petitioner to be a responsible person on behalf of LeCave based upon the following:

a) he was listed as the Designated Tax Matters Partner on LeCave's U.S. Return of Partnership Income, form 1065, for tax year 2009;

b) he was listed as the responsible person on LeCave's application to renew its' sales tax certificate of authority; and

c) he granted power of attorney for LeCave to Roy Herbert, CPA, the accountant who provided representation for LeCave during the audit.

30. On March 17, 2011, the Division issued to petitioner, as a responsible person of LeCave, a notice of determination, assessment L-035536738, assessing sales and use taxes due for the period September 1, 2007 through November 30, 2009 in the amount of \$121,543.43, plus interest, for a current balance due of \$145,967.70.

31. Some time in March 2011, a notice of determination was also issued to Mr. Bihina, as a responsible person of LeCave. The disposition of that assessment is not part of the record.

32. Petitioner admits that he owned 50% of LeCave during the period September 1, 2007 through November 30, 2009.

33. A consolidated statement of tax liabilities was issued to petitioner on September 11, 2014 showing payments/credits of \$30,126.00 applied towards assessment L-035536738. At the hearing, petitioner claimed that M & I Entertainment, Inc., owned by Messrs. Elsayed and Abdullah, paid \$30,126.00 towards LeCave's outstanding sales tax liability for the period September 1, 2007 through November 30, 2009, but did not pay the liability in full.

34. The Division issued a notice of proposed driver license suspension, dated September 11, 2014, to petitioner pursuant to Tax Law § 171-v (suspension notice). Attached to the suspension notice was a consolidated statement of tax liabilities referencing two outstanding assessments, notice numbers L-035536738 and L-023333004.<sup>9</sup> Subsequently, petitioner protested the suspension notice by requesting a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS). After a conciliation conference, BCMS issued a conciliation order, dated June 12, 2015, that denied the request and sustained the suspension notice.

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<sup>9</sup> Assessment ID # L-023333004 was issued to Maurice Bitton as the responsible person of MBMB, Inc., and assessed sales tax due for the period ended May 31, 2002.

35. On August 26, 2015, petitioner filed a petition challenging the suspension notice and the underlying assessment, notice number L-035536738.<sup>10</sup> On November 4, 2015, the Division filed its answer. Subsequently, by letter, dated June 24, 2016, addressed to the undersigned administrative law judge, the Division's representative advised that the Division had cancelled the suspension notice, and was prepared to proceed on the merits of the underlying assessment, notice number L-035536738.<sup>11</sup> The Division, pursuant to permission granted on August 10, 2016, filed an amended answer addressing notice of determination L-035536738 and clarifying the issues.

#### ***SUMMARY OF PETITIONER'S POSITION***

36. Although petitioner admits that he owned 50% of LeCave, he asserts that he was not a responsible person of the company during the audit period. Petitioner asserts that he could not take an active role in managing LeCave because of his chronic illness. He further asserts that Mr. Bihina, the other 50% owner of LeCave, was the general manager and the responsible person during the period September 1, 2007 through November 30, 2009. Petitioner also claims that as part of his October 15, 2010 agreement to sell his 50% membership interest in LeCave to Messrs. Elsayed and Abdullah, they were to pay \$100,000.00 at the closing that was to be used to pay LeCave's sales tax liability for the period September 1, 2007 through November 30, 2009. However, only \$30,126.00 was paid towards LeCave's outstanding sales tax liability. Petitioner further claims that he lost everything because Messrs. Elsayed and Abdullah lost LeCave's liquor license, closed the restaurant and defaulted on the October 15, 2010 agreement.

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<sup>10</sup> Petitioner also filed a petition challenging the suspension notice and the underlying assessment, notice number L-023333004. The Division of Tax Appeals assigned DTA No. 827185 to the petition.

<sup>11</sup> This letter also advised that the Division was prepared to proceed on the underlying assessment protested in petitioner's petition assigned DTA No. 827185.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1133 (a) provides that “every person required to collect any tax imposed by this article [article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article.”

B. Tax Law § 1131 (1) defines “person required to collect any tax imposed by this article” to include:

“any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article; *and any member of a partnership or limited liability company*” (emphasis added).

C. As noted above, Tax Law § 1131 (1) clearly states that any member of a limited liability company is a “person required to collect any tax imposed by this article” and, as provided in Tax Law § 1133 (a), a member of a limited liability company “shall be personally liable for the tax imposed, collected or required to be collected under this article.” The Tax Law contains no factors to qualify or limit the liability imposed upon members of limited liability companies. In *Matter of Santo* (Tax Appeals Tribunal, December 23, 2009), the Tribunal stated:

“Petitioner was a member of a limited liability company and, as with members of a partnership, such members are subject to per se liability for the taxes due from the limited liability company. . . . Since Tax Law § 1131(1) imposes strict liability upon members of a partnership or limited liability company, all that is required to be shown by the Division for liability to obtain is the person’s status as a member.”

D. Petitioner was a 50% member of LeCave, a limited liability company, during the period September 1, 2007 through November 30, 2009 (*see* findings of fact 3, 12, and 32). By virtue of his status as a 50% member of LeCave, petitioner was properly subject to assessment, and was

per se personally liable, pursuant to Tax Law §§ 1133 (a) and 1131 (1), for the sales and use taxes due herein (*see Matter of Santo; see also Matter of Eugene Boissiere and Jason Krystal*, Tax Appeals Tribunal, July 28, 2015; *Matter of Franklin*, Tax Appeals Tribunal, May 14, 2015). Given petitioner's 50% ownership interest in LeCave, he is not eligible for the relief afforded under TSB-M-11 (17) S.

E. The petition of Maurice Bitton is hereby denied and notice of determination L-035536738, dated March 17, 2011, is sustained.

DATED: Albany, New York  
April 19, 2018

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE