

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRONT STREET RESTAURANT CORP. : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 827293
Use Taxes under Articles 28 and 29 of the Tax Law for the
Period December 1, 2011 through February 28, 2013. :

Petitioner, Front Street Restaurant Corp., 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 December 1, 2011 through February 28, 2013.

A formal hearing was held in New York, New York on October 26, 2016, with all briefs to be submitted by July 17, 2017, which date began the six-month period for issuance of this determination. Petitioner appeared by the Shell Law Firm, PLLC (Martin Shell, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Nicholas A. Behuniak, Esq., of counsel). After reviewing the entire record in this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a refund of sales taxes collected and remitted to New York State with its sales tax returns for the periods in issue.

FINDINGS OF FACT

1. Front Street Restaurant (Restaurant), operates at One Front Street in Brooklyn, New York. The restaurant was opened in 2004 by Marcelo Pevida.

2. Frank Ciolli owned and operated a restaurant named Grimaldi's Pizzeria during the periods in issue. Grimaldi's was originally operating at 19 Old Fulton Street in Brooklyn, New York.

3. In 2011, Mr. Ciolli and Mr. Pevida entered into a business relationship that created petitioner, Front Street Restaurant Corp., that was evidenced by three separate, written agreements. The first and second agreements indicate a date of October of 2011. The first agreement left the day of the month blank for the agreement.¹ Such agreement was between Mr. Ciolli and Mr. Pevida. Each was determined to be a shareholder in the operating agreement. Mr. Ciolli was a 40% shareholder and was named Vice President/Secretary and Director. Mr. Pevida was a 60% shareholder and was named President and Director.

4. In the second written agreement, the date noted is October 3, 2011, and it is between three parties: Mr. Ciolli, Mr. Pevida and Mr. Jia Ju Tao. The language in this agreement provided that Mr. Ciolli remained a 40% shareholder, while both Mr. Pevida and Mr. Tao were 30% shareholders. Both Mr. Ciolli and Mr. Pevida retained their titles as set forth in the first agreement. Mr. Tao was named Treasurer.

5. The third written agreement was entered into by the parties after the period at issue in this matter and, thus, will not be considered in this determination.

6. It was agreed that Grimaldi's would move its pizza operations into the Restaurant's neighboring location. Moreover, the two business entities would continue to remain separate service operations.

7. The first and second written operating agreements provided that:

¹As noted at the hearing (Transcript, p. 28), exhibit 1 was missing the second page of the six-page agreement.

“[t]he parties agree to cooperate with each other and to utilize the single accountant for the Corporation taxes, with each party contributing to the corporation taxes as necessary based upon the revenues and expenses incurred by each of the two parties in their respective. The accountant will maintain separate balance sheets and accountings for the Grimaldi operation and for the Cabaret operation, and each party shall have full access to all records maintained by the Corporation accountant.”

8. Under these agreements, each business operation was responsible for its portion of the revenue and expenses as well as its portion of the sales tax collected and remitted to New York under the corporation’s single tax return for each quarterly tax period.

9. As a corporation, petitioner timely filed its New York State and Local Quarterly Sales and Use Tax Returns (ST-100s) and remitted the tax collected with the returns. Mr. Pevida signed and filed the quarterly return for the initial period of December 1, 2011 through February 29, 2012. Mr. Ciolli signed and filed the remainder of the returns for the period in issue.

10. On or about July 1, 2014, petitioner filed amended sales tax returns using information that it alleges pertained solely to the operation of the Restaurant. Petitioner asserted that the original ST-100s filed by it reflected sales tax due for both business operations in error. Therefore, petitioner claimed a refund to the extent that the corporation paid sales tax revenue in excess of the sales tax liability for the operation of the Restaurant only.

11. By letter dated December 22, 2014, the Division of Taxation (Division) denied petitioner’s refund claim in full. The Division stated that petitioner failed to provide any documentation that established any basis for the refund claimed.

12. Petitioner thereafter filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services to contest the refund denial by the Division. By conciliation order dated July 31, 2015, the refund denial letter was sustained. Petitioner then filed a timely petition with the Division of Tax Appeals.

13. At the hearing, petitioner presented the testimony of Mr. Pevida. His testimony discussed the difficult relationship he experienced with Mr. Ciolli. Petitioner did not submit any documentation regarding sales during the periods for which a refund was claimed. Neither Mr. Ciolli nor Mr. Tao appeared at the hearing.

14. The Division submitted 15 proposed findings of fact pursuant to section 3000.15 (d) (6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. All of the proposed findings of fact have been accepted and incorporated within the findings herein except for proposed finding of fact 7, which is deemed irrelevant.

CONCLUSIONS OF LAW

A. Tax Law § 1105 (d) provides that the sale of certain food and beverage is subject to sales tax. In this case, it is undisputed that petitioner, as a corporation operating two separate businesses, collected sales tax on its sales of food and beverage. As set forth in the findings of fact, petitioner timely filed its quarterly tax returns and remitted sales tax collected with these returns.

B. On or about July 1, 2014, petitioner filed its claim for refund based upon Mr. Pevida's argument that the Restaurant paid more than its share of the tax liability for the corporation. Based upon this assertion, he requests that the Division refund him money he paid over as collected sales tax on behalf of Grimaldi's. This argument is without merit.

C. Tax Law § 1139 (a) provides for a refund or credit of any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid under certain circumstances. It is noted herein that petitioner chose to form a corporation of two business operations. As a corporation, it was decided to file under one vendor identification number. There is no dispute that petitioner collected and remitted sales tax in a timely manner to the Division. Petitioner has

not alleged an erroneous or illegal payment of sales tax. Rather, Mr. Pevida seeks to disavow the corporate agreement and claims he is entitled to a refund based upon the Restaurant overpaying its portion of the ultimate corporate tax liability. The Restaurant is not the taxpayer in this proceeding, but rather, petitioner is the corporate entity.² Since petitioner properly collected and remitted sales tax to the Division, petitioner is not entitled to a refund.

E. The petition of Front Street Restaurant Corp. is denied and the refund denial letter, dated December 22, 2014, is sustained.

DATED: Albany, New York
January 11, 2018

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE

²The underlying financial dispute between Mr. Pevida and Mr. Ciolli, as a result of their corporate agreement, is an issue beyond the scope of the jurisdiction of the Division of Tax Appeals.