

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**SUSAN C. GEMMETTE** :

for Revision of Determinations or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Periods March 1, 2001 through May 31, 2001; March 1, :  
2002 through November 30, 2002; and September 1, 2003 :  
through November 30, 2003; and for Redetermination of a :  
Deficiency or for Refund of New York State Personal :  
Income Tax for the Period April 1, 2002 through June 30, :  
2002.

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DETERMINATION  
DTA NO. 820415

Petitioner, Susan C. Gemmette, 1353 Lexington Avenue, Schenectady, New York 12309, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 2001 through May 31, 2001, March 1, 2002 through November 30, 2002, and September 1, 2003 through November 30, 2003, and for redetermination of a deficiency or for refund of New York State personal income taxes for the period April 1, 2002 through June 30, 2002.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on November 16, 2005 at 10:30 A.M., with all briefs to be submitted by April 7, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Lori P. Antolick, Esq., of counsel).

***ISSUES***

I. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of 2 Argyle Place Enterprises, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a), and is, therefore, personally liable for payment of the taxes, penalties and interest due from the corporation.

II. Whether petitioner was a person responsible for the collection and payment of withholding taxes on behalf of 2 Argyle Place Enterprises, Inc. within the meaning and intent of Tax Law § 685(g), and is, therefore, personally liable for payment of the taxes, penalties and interest due from the corporation.

III. Whether the Division properly assessed penalties against petitioner for such unpaid taxes.

***FINDINGS OF FACT***

1. 2 Argyle Place Enterprises, Inc., which was doing business as Sportsworld Tavern and Grill (“Sportsworld”), was a tavern and grill located in Schenectady, New York, owned by George Kinney, the father of Susan C. Gemmette (“petitioner”). Sportsworld had live bands on occasion in the evenings and served light fare. Petitioner was an employee of the corporation.

2. Petitioner and her father were estranged for a number of years, because Mr. Kinney lived out of the area for some period of time. Around 1997, George Kinney returned to the Schenectady, New York area and indicated to petitioner that he wanted to open a business again, in a building he had formerly owned. Petitioner was at that time married with a seven-year old child, and was not interested in any significant business or financial responsibility for her father’s business, and communicated the same to him. Wanting to rebuild their relationship, she agreed to, at most, be a daytime employee, take care of ordering kitchen and bar items and do

what was needed to run the business during the daytime hours. She was paid a salary for her services. Since her father would sometimes travel away from the business, he put petitioner's name on the checking account so that checks to suppliers, particularly, could be issued in his absence. Mr. Kinney had been diagnosed with Parkinson's disease around the same time.

3. Sportsworld opened for business in 1998 and officially closed in December 2003. By the end of 2001 and beginning of 2002, Mr. Kinney's health had further deteriorated, and he attempted to sell the business, being less capable of running it as time went on. After the business closed, in January 2004, the City of Schenectady took over the building. In November 2004, Mr. Kinney passed away.

4. The Division of Taxation ("Division") issued five notices of determination dated November 3, 2003, and one for the quarter ended November 30, 2003 dated April 26, 2004, to petitioner, each of which advised that she was liable as an officer or responsible person for sales and use taxes determined to be due from Sportsworld. The notices of determination were as follows:

| Period Ended | Tax        | Interest   | Penalty    | Payments/Credits | Total Due  |
|--------------|------------|------------|------------|------------------|------------|
| 05-31-01     | \$4,687.20 | \$1,585.97 | \$1,406.12 | \$1,478.79       | \$6,200.50 |
| 05-31-02     | 3,550.58   | 685.69     | 923.05     | 0.00             | 5,159.32   |
| 08-31-02     | 2,615.48   | 412.14     | 601.49     | 0.00             | 3,629.11   |
| 11-30-02     | 3,001.88   | 370.62     | 600.28     | 0.00             | 3,972.78   |
| 2-28-03      | 2,648.72   | 240.28     | 450.23     | 0.00             | 3,339.23   |
|              |            |            |            |                  |            |

|          |          |       |        |      |          |
|----------|----------|-------|--------|------|----------|
| 11-30-03 | 1,447.88 | 72.26 | 202.66 | 0.00 | 1,722.80 |
|----------|----------|-------|--------|------|----------|

5. The Division issued a notice of deficiency to petitioner dated June 1, 2004, which advised that she was liable as an officer or responsible person for withholding taxes determined to be due from Sportsworld . The notice of deficiency was a penalty in the amount of \$156.67, for the period ended June 30, 2002.

6. The Division submitted into evidence a document from the First National Bank of Scotia, New York, called Information for Resolutions. It listed petitioner's father, George A. Kinney as president of Sportsworld, with no other officers, and listed only Mr. Kinney as a person authorized to sign notes. It further listed two persons authorized to sign checks, Mr. Kinney and petitioner, Susan C. Gemmette.

7. The Division submitted copies of the sales and use tax returns, as well as the CARTS assessment receivable information for each of the periods set forth in Finding of Fact "4." Five of the six sales and use tax returns were signed by petitioner's father, George Kinney, and the sixth was not signed at all. Each of the returns was filed late with no remittance of sales and use taxes as shown due on the returns.

8. The Division introduced into evidence five checks drawn on Sportsworld's checking account at First National Bank of Scotia, two of which were payable to the Division for payment of Sportsworld's employment taxes and the other for sales tax due. Both were dated September 20, 2001 and signed by petitioner while her father was away. Attached to the first check was a New York State quarterly withholding return dated September 21, 2001, listing seven employees, including petitioner, which petitioner filled in from information prepared by her father. Attached to the second check was an unsigned New York State Sales and Use Tax

Return for the quarter ended August 31, 2001, also filled in by petitioner from information prepared by George Kinney. Neither return was signed by petitioner.

The other checks were dated April 20, 2003, December 18, 2003 and January 8, 2004, payable to Service, a liquor distributor, cash, and First National Bank of Scotia, respectively. With the exception of the last check, also bearing Mr. Kinney's signature, the other checks were signed by petitioner.

9. A bank information document from the First National Bank of Scotia was provided by the Division referencing a Sportsworld account that was opened on October 31, 1997. The authorized signatories on the account were Mr. Kinney, listed as president, and petitioner, listed as an "auth sig."

10. The Division offered into evidence a New York State Department of Taxation and Finance document entitled "Proposed Terms for Installment Payment Agreement" dated September 24, 2003, signed by petitioner on that date under power of attorney. She signed the document in an attempt to help Mr. Kinney conclude his business affairs on the advice of an attorney, when he was no longer mobile due to sickness.

11. A judgment against 2 Argyle Place Enterprises Inc. was filed with the Schenectady County Clerk's office in favor of the Division on March 31, 2004. The information subpoena introduced into evidence which corresponded to that judgment listed petitioner as an "authorized signature power of attorney" on a bank account owned by Sportsworld.

12. George Kinney hired and fired employees, made the necessary financial decisions and owned 100% of the stock of the corporation. He was the decision maker for the business. Petitioner did not invest any of her own money into the corporation, was not an officer and did

not own stock at any time. She did not prepare or sign sales and use tax returns. Her name was added to the checking account for her father's convenience.

### ***SUMMARY OF THE PARTIES' POSITION***

11. Petitioner maintains that she assisted her father in the business, as would any adult child, but had nothing to do with the financial affairs of Sportsworld, and had no decision-making responsibilities aside from ordering supplies, and therefore, should not be held responsible for Sportsworld's unpaid tax liabilities.

13. The Division argues that there is sufficient indicia of responsibility to hold petitioner accountable as a person responsible for the tax, penalties and interest imposed on Sportsworld, and petitioner has not shown reasonable cause for abatement of penalties.

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

A. Tax Law § 1133(a) imposes upon any person required to collect sales tax under Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

B. Tax Law § 685(g) imposes upon any person required to collect, truthfully account for and pay over withholding taxes who willfully fails to collect and pay over such taxes, "a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

Tax Law § 685(n) defines "person," for purposes of Tax Law § 685(g), to include, among others,

corporate officers and employees who are under a duty "to perform the act in respect of which the violation occurs." Whether someone is a "person" under a duty to collect and pay over

withholding taxes is similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes (*see, Matter of Picciurro*, Tax Appeals Tribunal, August 11, 1994; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). C. The resolution of whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448). In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the Tax Appeals Tribunal stated:

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation [citations omitted]

D. While it is true that petitioner signed a few checks on behalf of Sportsworld and appeared on some banking documents as an authorized signatory, the record, when considered in its entirety, reveals that petitioner was not a person responsible for the collection and payment of the sales and withholding taxes of Sportsworld. Petitioner was not a corporate officer, and despite her check-signing authority, given for the sake of her father's convenience, she was merely a salaried employee who assisted her father, the owner and operator of the business, and took direction from him. While she testified that she may have prepared a few tax returns on behalf of Sportsworld, they were done at her father's direction, with information he provided to her. None of the returns contained in the record bear her signature. Petitioner made no investment in the company, she was not a shareholder of Sportsworld, nor was she a director.

She had no authority to hire and fire employees or to determine which of the corporation's creditors (including taxing authorities) were to be paid first. This was clearly not a case where petitioner could have acted but chose not to (*cf.*, *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027).

In summary, petitioner had no authority over the financial affairs of Sportsworld and cannot, therefore, be held to be personally liable for sales and use taxes imposed, collected or required to be collected pursuant to Tax Law §§ 1131(1) and 1133(a), nor can she be found to be a person required to collect, truthfully account for and pay over withholding taxes on behalf of Sportsworld who willfully failed to collect and pay over such taxes. She cannot therefore be subject to the penalty imposed by Tax Law § 685(g).

E. Inasmuch as a determination has been made that petitioner is not a responsible person for the taxes at issue herein, the issue of penalties is deemed moot and not further addressed.

F. The petition of Susan C. Gemmette is granted, and the notices of determination and the notice of deficiency issued to petitioner dated April 26, 2004 and June 1, 2004, respectively, are hereby canceled.

DATED: Troy, New York  
October 5, 2006

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE