STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **EDWARD YAGER AND PATRICK McKEON D/B/A CALIFORNIA BREW HAUS** 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, 1981 through November 30, 1984.	DECISION DTA NO. 802980

Petitioners, Edward Yager and Patrick McKeon d/b/a California Brew Haus, 402 Ridge Road West, Rochester, New York 14615, filed an exception to the determination of the Administrative Law Judge issued on April 28, 1988 with respect to their 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, 1981 through November 30, 1984 (File No. 802980). Petitioners appeared by Osborn, Reed, Van De Vate & Burke (John A. Ferr, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioners filed a brief on exception. The Division submitted a letter in lieu of a brief. Oral argument was held, at the request of the petitioners, on October 13, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners are liable for sales and use taxes upon the receipts from the charges imposed on patrons admitted to the California Brew Haus and, if so, whether penalty and interest should be waived.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. We also find an additional fact as noted.

During the years in issue, petitioners, Edward Yager and Patrick McKeon, operated a tavern known as the California Brew Haus ("the tavern"). On November 15, 1985, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioners, Edward Yager and Patrick McKeon d/b/a California Brew Haus. The notice assessed a deficiency of sales and use taxes for the period December 1, 1981 through November 30, 1984 in theamount of $27,291.74, plus penalty of $6,332.38 and interest of $8,414.46, for a total amount due of $42,038.58.

In the course of its audit, the Division found that for the years 1982 and 1983 the gross income reported on petitioners' Federal partnership income tax returns corresponded with the level of gross sales reported on the sales and use tax returns. However, the Division also found amounts listed as other income which were not reported on the sales and use tax returns. Petitioners' accountant explained that the amounts reported as other income arose from admission charges for entertainment. The Division concluded that the admission fees for entertainment were subject to sales and use taxes which, in turn, led to the assessment at issue herein.

In order to determine the amount of tax due for the years 1982 and 1983, the Division utilized the amount of admission receipts reflected on petitioners' records. The Division determined the level of admission receipts subject to tax for the year 1984 from information provided by the accountant. The Division estimated the amount of taxable receipts for the month of December 1981 on the basis of receipts found subject to tax in subsequent quarters. No evidence was offered to show that prior to estimating said taxable receipts, a request was made for pertinent records.

During the periods in issue, it was petitioners' practice to have musical entertainers perform at the tavern. Petitioners' manager, Richard Scorse, entered into written contracts with various bands to provide the entertainment. In some instances, the contracts provided that the bands would receive either a minimum amount of money or a percentage of the receipts which patrons would remit upon entering the tavern. In the event the admission receipts were less than the minimum, the tavern would have to make up the difference. In some of the contracts, if the percentage of the admission

receipts payable to the band exceeded the contractual minimum, the tavern would receive that portion of the admission receipts which exceeded the agreed upon percentage.

We also find as an additional fact that:

> All of the contracts introduced at the hearing describe the relationship between petitioners and the performers either as a "performance agreement" or a "contract for personal services". Further, some of the contracts provided that in consideration for the services provided by the bands petitioners would pay a "wage" to the bands while the other contracts described the consideration as the "terms agreed upon" for the performance.

The door charges would be set by the band or agreed to in the written contract. The bands were responsible for collecting the money at the door. Therefore, the bands generally placed an individual at the tavern entrance to collect their fee. On occasion, the members of a band could not locate a person who would collect the entertainment fee on their behalf. Therefore, the band members would request that one of petitioners' employees collect the entertainment fee on the band's behalf. When one of petitioners' employees complied with this request, the employee was told that he was collecting on behalf of the band. Employees of the tavern were also told that they were not required to collect door fees if they did not wish to because it was not part of their job duties as an employee of the tavern.

When the person collecting the entertainment fees ceased doing so for the night, the money would be brought to the band leader to be counted. Petitioners' manager was usually present when the entertainment fees were counted in order to ascertain whether the band collected the minimum fee and to determine how many patrons the band attracted. In addition to the member of the band collecting the entertainment fees, petitioners would normally have one or two employees at or near the door to ascertain whether individuals entering the tavern were over the minimum age and to count the number of patrons to insure compliance with the fire code. Petitioners maintained a record of their daily admissions. However, this record was used simply to evaluate the ability of the

different bands to attract customers.

Petitioners never filed an amended return to delete the admission fees which had been recorded on their partnership return as other income. An amended return was considered unnecessary since a corresponding expense was also claimed resulting in no additional income.

OPINION

In the decision below the Administrative Law Judge decided that petitioners were liable for sales taxes on charges imposed on tavern patrons. Specifically, it was determined that the charge imposed constituted a "cover, minimum, entertainment or other charge" taxable pursuant to Tax Law section 1105(d)(i). Further, it was concluded that petitioners were vendors with respect to such charges. As a result, the Notice of Determination was sustained except for one month for which petitioners' records had not been requested. Additionally, the imposition of penalty and interest was upheld.

On exception petitioners contend that they were not persons required to collect tax with regard to the charges imposed on patrons. Specifically, petitioners argue that it was the responsibility of the band performing to collect and remit any sales tax due. Petitioners support this by claiming that the bands set the charges, collected the charges and contracted to pay all taxes incurred as a result of such charges. Alternatively, petitioners request that if they are found to be liable for sales taxes, that penalty and interest be abated. Such abatement would be proper, it is argued, because the contractual provisions and the actions of the bands provided petitioners with a reasonable belief both that they were not responsible for taxes and that such taxes would be paid.

In response, the Division contends that petitioners were required to collect tax upon the cover charges imposed at the tavern during the period at issue. Specifically, the Division contends that the evidence indicates that petitioners treated the charges imposed as income and the costs of the bands as expense. The bands, it is argued, were petitioners' agents or co-vendors as they assisted in the collection of the charges. Further, the Division requests that the imposition of penalty and interest be sustained. The Division argues that the petitioners treatment of the charges as income is one of many factors indicating that reasonable cause for abatement of penalty does not exist.

We affirm the decision of the Administrative Law Judge.

Tax Law section 1105(d)(i) in part imposes a tax upon:

> "The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers...."

The charge imposed upon patrons for admission to the tavern clearly constituted a "cover, minimum, entertainment or other charge" within the meaning of Tax Law section 1105(d)(i). As a result, such charges are subject to sales and use taxes.

What remains to be decided is whether petitioners were vendors with respect to the charges imposed such that they were responsible for the collection and remittance of tax due on the charges. Tax Law section 1101(b)(8)(i)(A) includes within the meaning of "vendor", "A person making sales of tangible personal property or services the receipts from which are taxed by this article [Article 28]". We agree with the Administrative Law Judge that the substance of the transactions involved is that petitioners were allowing the bands to collect an entertainment fee on petitioners' behalf. The petitioners were then obligated to pay the performers a fixed amount or a percentage of the entertainment fee for the performer's services.

Several points support this conclusion. The contracts submitted illustrate petitioners' direct interest in the entertainment fee, since the bands became an expense of the tavern if a sufficient amount of money to cover the agreed upon minimum fee was not collected at the door. In contracts where the band would receive less than 100% of the entertainment fees, the tavern would receive income if the total intake from the fees exceeded the contracted price for the band. Petitioners' employees played a role in both collecting fees at the door and in determining if patrons were of legal age to be admitted to the tavern. Finally, the contracts consistently indicate that petitioners hired the performers to provide an entertainment service, in exchange for which petitioners were obligated to pay the performers. The contracts do not indicate, as urged by petitioners, that petitioners merely provided a place for the entertainers to perform in exchange for which petitioners received commission income. Taken as a whole, we conclude that the facts indicate that petitioners

were vendors with respect to the entertainment fees charged at the door.

The last issue to be addressed is whether a penalty should be imposed for petitioners' failure to pay the sales taxes due. Tax Law section 1145(a) and 20 NYCRR former section 536.1(a) allow for penalty and for that amount of interest which exceeds the amount of interest prescribed by law to be remitted if the failure to pay taxes due is due to reasonable cause and not due to willful neglect. The burden is on petitioner to prove that he falls within the standard allowing for the abatement of such penalty and interest. We find that petitioners have not met their burden of proving reasonable cause and the absence of willful neglect. Petitioners' claim, that they relied on those provisions of their contracts with the bands which provide that the bands would be responsible for all taxes due, must be dismissed. Petitioners cannot release themselves from liability for tax due by assigning their statutory obligations under the Tax Law to another party by way of a contractual provision. Petitioners' misplaced reliance is certainly not reasonable cause for their failure to pay under the circumstances. Thus, we sustain the imposition of penalty and interest.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners, Edward Yager and Patrick McKeon d/b/a California Brew Haus, is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Edward Yager and Patrick McKeon d/b/a California Brew Haus is granted to the extent indicated in conclusions of law "B" and "G" of the Administrative Law Judge's determination, but except as so granted is in all other respects denied.

Dated: Albany, New York
March 23, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner