

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
NEW JOLLY SWAGMAN INN CORP. :
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 June 1, 1983 :
through May 31, 1986 :

In the Matter of the Petition :
of :
WINFRIED PIECHUTZKI, :
OFFICER OF NEW JOLLY SWAGMAN INN CORP. :
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 June 1, 1983 :
through May 31, 1986 :

DECISION
DTA Nos. 805151,
805152 and 805154

In the Matter of the Petition :
of :
LAURA PIECHUTZKI, :
OFFICER OF NEW JOLLY SWAGMAN INN CORP. :
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 June 1, 1983 :
through May 31, 1986 :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 13, 1990 with respect to the petitions of New Jolly Swagman Inn Corp., Winfried Piechutzki, officer of New Jolly Swagman Inn Corp. and Laura Piechutzki, officer of New Jolly Swagman Inn Corp., 11 Ash Lane, Hicksville, New York 11801 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 June 1, 1983 through May 31, 1986. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners did not file a brief in response. Oral argument was requested by the Division of Taxation but the request was later withdrawn.

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

ISSUE

Whether the Division of Taxation's use of revenue figures reported on the 1984 U.S. Corporation Income Tax Return of petitioner New Jolly Swagman Inn Corp. as a basis for determining the corporation's taxable sales was proper and, if so, whether the additional taxable sales determined as a result thereof were correct.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

Petitioner New Jolly Swagman Inn Corp. was a restaurant which served Australian and German cuisine. The restaurant had a U-shaped bar in the center and tables and chairs on both sides of the bar which, in total, could accommodate approximately 150 patrons. On the second floor there was a banquet room which could accommodate approximately 50 people. The restaurant was located in a residential neighborhood.

In or about July 1986, the Division of Taxation ("Division") commenced a field audit of the restaurant. The restaurant was selected for an audit, because the Division found a discrepancy between the gross sales reported on the restaurant's U.S. Corporation Income Tax Return and the restaurant's sales and use tax returns for the same period of time. Upon scheduling a field audit appointment, the Division sent a letter requesting that the restaurant have

available all books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales and purchase invoices, cash register tapes, exemption certificates and sales tax records. In addition to this letter, the Division mailed a checklist of needed records which specifically requested the restaurant's general ledger, cash receipts journal, cash disbursements journal, Federal income tax returns, sales tax returns and worksheets, fixed asset invoices, guest checks and cash register tapes for the period March 1984 through May 1984, resale, exempt and capital improvement certificates for March 1984 through May 1984, New York State corporation tax returns, the latest New York State WRS-2 return and the latest withholding tax returns and checks to New York City and New York State.

In response to the foregoing request, the auditor was presented with the restaurant's records except that there were no check or cash disbursement records for the period August 1984 through May 1986. The auditor was also not furnished with any information on one of the restaurant's bank accounts. In addition, the auditor was not provided with the restaurant's Federal and New York State return for the fiscal year ending July 31, 1985 or the Federal return for the fiscal year ending July 31, 1986. Lastly, some of the restaurant's serially-numbered guest checks were missing.

We find an additional finding of fact to read as follows:

The auditor obtained a transcript from the Federal government containing the information reported on the restaurant's Federal income tax return for the fiscal year ending July 31, 1984. The Division failed to produce a copy of the Federal return for this period.

The auditor found that gross sales reported on the restaurant's Federal income tax return for the fiscal year ending July 31, 1984 were \$219,995.00 whereas the gross sales shown on petitioner's sales and use tax returns for the same period of time were \$156,504.00. The auditor ascertained that the reason for this difference was that the sales tax returns were prepared by the principals of the restaurant from the restaurant's sales journal whereas the restaurant's Federal income tax returns were prepared by its accountant.

The auditor opined that the markup determined by the amounts shown on the Federal returns was adequate for this type of business and therefore the Division accepted the gross sales shown on the Federal return.

In order to calculate the amount of sales tax due the Division computed a margin of error of .405 by dividing the difference between gross sales shown on the restaurant's Federal income tax returns for the fiscal year ended July 31, 1984 and the sales tax returns for the same period of time (\$219,995.00 - \$156,504.00 = \$63,491.00) by the gross sales shown on the sales tax returns. Additional taxable sales were then determined by multiplying the error rate by the gross sales shown on the sales tax returns. Lastly, the Division calculated additional tax due by multiplying the additional taxable sales by the applicable tax rate (either 8% or 8.25% depending on the period).

On the basis of the foregoing audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated December 30, 1986, to the restaurant. The notice assessed sales and use taxes for the period June 1, 1983 through May 31, 1986 in the amount of \$18,715.78 plus penalty of \$4,183.88 and interest of \$4,458.58 for a total amount due of \$27,358.24. The Division also issued notices dated December 30, 1986 which assessed the same amount of tax, penalty and interest against Laura Piechutski and Winfried Piechutski as had been assessed against the restaurant. The latter notices explained that, as officers, Laura Piechutski and Winfried Piechutski were liable for the taxes due from the restaurant.

After the foregoing assessments were issued, a conference was held wherein petitioners presented an amended U.S. Corporation Income Tax Return which was filed for the fiscal year ending July 31, 1984. Petitioners also presented U.S. corporation income tax returns for the fiscal years ended July 31, 1985 and July 31, 1986. On the amended Federal return for the period ended July 31, 1984, the gross sales corresponded with the sales which had been reported on the sales and use tax returns.

Upon receipt of the new information, the auditor agreed to perform additional audit work. Thereafter, the auditor examined the restaurant's bank records and found that for the fiscal year

ended July 31, 1985 there was a total of \$117,133.19 deposited. Of the total amount deposited, \$1,600.00 was in cash. During the same period of time, the total deposits to the restaurant's account at Long Island Trust were \$45,869.64 of which \$4,200.00 was made in cash. During the fiscal year ending July 31, 1986, the total deposits into the restaurant's account at the State Bank of Long Island were \$119,687.97 of which \$4,440.00 was cash. During the same period of time, the total deposits into the restaurant's Long Island Trust account were \$31,602.41 of which \$700.00 was cash. The Division also found that for the fiscal year ended July 31, 1985, the U.S. Corporation Income Tax Return reported gross sales of \$164,414.00 while total bank deposits during the same period of time were \$163,002.83. For the fiscal year ended July 31, 1986, the U.S. Corporation Income Tax Return reported gross sales of \$144,624.00 while total bank deposits during the same period were \$150,990.38. The auditor also ascertained that for the fiscal year ended July 31, 1984 recorded purchases of food by check were \$13,772.78 whereas the recorded check purchases of liquor were \$29,972.94.

Upon completing this review, the auditor concluded that the amended returns would not be given any weight because, in the auditor's opinion, the returns presented at the conference did not take into account cash payouts. That is, the auditor concluded that the cash which was received from sales was being used to pay for purchases without being recorded in bank accounts or journals. The auditor also concluded that the restaurant's records were inadequate because the respective purchases of food and liquor were not consistent with restaurant activity and because food purchases were only 31 percent of the total recorded check purchases.

During the period in issue, the restaurant served a small local clientele. A high percent of the restaurant's sales were paid by credit card. The rest of the people who patronized the restaurant were local professionals who maintained an account with the restaurant. These people would make periodic payments by check.

The restaurant had one cash register which was located behind the bar. Following a sale, the waitress would give the check to the bartender who would run the check through the cash register machine which would stamp the amount of the sale and the sales tax. The guest checks

would then be placed into a small rack next to the cash register. At the end of a shift, all of the guest checks were totalled. Also, the cash register tapes were totalled and balanced against the guest checks. Both the guest checks and cash register tapes were available to the auditor.

Petitioners have not seen the accountant who prepared the U.S. Corporation Income Tax Return for the fiscal year ended July 31, 1984 since sometime in 1984. Petitioner's current accountants were retained in or about the end of March 1987. Upon being retained, the current accountant discovered that returns had not been prepared for the fiscal years ending July 31, 1985 and July 31, 1986. Therefore, they proceeded to prepare and file the necessary returns.

When one of the current accountants started examining the check disbursement journals, he found that generally, with the exception of the wage expense, the amounts stated on the U.S. Corporation Income Tax Return for the fiscal year ended July 31, 1984 did not correspond with the amounts recorded in the check disbursements journal. Thus, the amounts on the tax returns for items such as rent, utilities, advertising and taxes were all erroneous. The accountant did note that one amount that was accurately reported was payroll. However, this account was separately maintained by a computer payroll firm.¹

Usually, the restaurant paid for its purchases by check.

During the period in issue, Winfried Piechutski took mortgages on his home to provide funds for the restaurant.

Although requested, petitioner's representative was not provided with a complete set of workpapers prior to the hearing. However, she was given an opportunity to examine the workpapers before they were received in evidence. Subsequently, they were received in evidence without objection.

OPINION

In the determination below, the Administrative Law Judge cancelled the notices of determination issued to petitioners, as he found the Federal corporation income tax return for

¹A comparison of the original and amended returns shows that while there was a significant discrepancy in almost every account, a few accounts, in addition to payroll, did coincide. Those accounts which matched were beginning inventory, depreciation, net operating loss and travel and entertainment.

petitioner New Jolly Swagman Inn Corp. for the year ended July 31, 1984 (hereinafter "the original 1984 Federal return"), which was used to determine additional sales tax owed by petitioners, to be erroneous.

On exception, the Division makes the following arguments:

1. There was insufficient evidence in the record for the Administrative Law Judge to find that the original 1984 Federal return was erroneous;

2. Petitioners have not satisfactorily explained why bank deposits exceeded sales, nor have they accounted for the existence of a high proportion of liquor purchases to food purchases;

3. Because restaurant supplies were sometimes purchased with cash, it is likely that the cash originated from restaurant sales which were not deposited in the restaurant's bank account. Accordingly, the fact that the total of the deposits listed on the restaurant's bank statements does not equal the sales figures on the corporation's original 1984 Federal return does not establish that the 1984 return is erroneous;

4. The Division's agreement to perform additional audit work upon petitioners' submission of an amended Federal corporation income tax return for the year ended July 31, 1984 did not constitute an admission by the Division that the amended return accurately reflected the sales figures contained therein.

As noted, petitioners did not respond to the Division's exception.

Because the Administrative Law Judge has correctly and adequately dealt with the Division's first three arguments,² and the Division's fourth point simply mischaracterizes the Administrative Law Judge's reasoning, we affirm based on the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

²As to the first point of the Division's exception, we refer to finding of fact "14" of the Administrative Law Judge's determination. We note that the testimony of petitioners' current accountant, who stated that the expense figures on the original 1984 Federal return failed to correspond with petitioners' check disbursement journals, supports the Administrative Law Judge's finding that the original 1984 Federal return reported erroneous amounts (see, Tr., pp. 58, 80, 83).

2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of New Jolly Swagman Inn Corp., Winfried Piechutski and Laura Piechutski as officers of New Jolly Swagman Inn Corp. are granted; and
4. The notices of determination and demand for payment of sales and use taxes due, dated December 30, 1986, are cancelled.

DATED: Troy, New York
October 15, 1992

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner