

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
NATIONAL URBAN VENTURES, INC., :
PARTNER OF WINTERGARDEN INN ASSOCIATES :
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, 1987 :
through August 31, 1990. :

DECISION
DTA NOS. 811157
AND 811158

In the Matter of the Petition :
of :
EDWARD U. BEVILACQUA, :
PARTNER OF WINTERGARDEN INN ASSOCIATES: :
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, 1987 :
through August 31, 1990. :

Petitioner National Urban Ventures, Inc., partner of Wintergarden Inn Associates, 335 Buffalo Avenue, Niagara Falls, New York 14303, and petitioner Edward U. Bevilacqua, partner of Wintergarden Inn Associates, P.O. Box 881482, San Diego, California 92108, filed exceptions to the determination of the Administrative Law Judge issued on June 2, 1994. Petitioner National Urban Ventures, Inc., partner of Wintergarden Inn Associates appeared by its Vice President, John Bartolomei, Esq., and Ralph J. Genovese, C.P.A. Petitioner Edward U. Bevilacqua, partner of Wintergarden Inn Associates appeared by Ralph J. Genovese, C.P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition to the exception filed by National Urban Ventures, Inc. and a brief in

opposition to the exception filed by Edward U. Bevilacqua. Petitioners did not file a reply brief. Petitioners' request for oral argument was withdrawn.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Pinto concurs. Commissioner Jenkins took no part in the consideration of this decision.

ISSUES

I. Whether petitioners are persons required to collect sales tax on behalf of Wintergarden Inn Associates and, thus, are liable for sales tax due under Tax Law § 1133(a).

II. Whether certain purchases were exempt from sales tax because they were used in conjunction with a hotel built with funding from bonds of an Industrial Development Authority.

III. Whether the Division of Taxation erroneously calculated the sales tax liability of Wintergarden Inn Associates.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Wintergarden Inn Associates ("Wintergarden") is a partnership with National Urban Ventures, Inc. ("National") as general partner and Edward U. Bevilacqua as a limited partner.

Wintergarden leased land from an Industrial Development Authority ("IDA"), using IDA bonding, and built a hotel in downtown Niagara Falls which opened in early 1986.

A letter of May 1, 1986 from the Niagara County IDA signed by its executive director states that any sales tax exemption shall cease upon completion of the project on or before May 1, 1986.

The hotel was known variously as Niagara Royale, Radisson Inn and Inn at the Falls. The hotel had 210 guest rooms, lounge, dinner and banquet facilities, a gift shop and hair salon. Its restaurant was apparently known as the Wintergarden Restaurant. The hotel closed in early 1989.

Edward U. Bevilacqua is the principal officer and a shareholder in National, the general partner in Wintergarden.

Edward U. Bevilacqua, a limited partner of Wintergarden, was also the project supervisor for Wintergarden in the building of the hotel.

After the opening of the hotel, Wintergarden continued to make improvements, purchase equipment and maintain the facility. Expense purchases found to be subject to tax by the auditor included supplies for the kitchen, cleaning of uniforms and repair of equipment of various kinds. A list of purchases indicating those without invoices is in evidence.

As part of the hotel operation, Wintergarden sold alcoholic beverages in many different areas of the operation. It sold the alcohol in the restaurant by the drink or by the bottle. In the lounge, drinks were sold at regular prices and "Happy Hour" prices. Alcohol could be purchased through room service by the drink or by the bottle. Banquet prices were quoted by the hotel at a price per person including drinks, or by the hour. Weekend packages were sold, including complimentary drinks. Also, a free bottle of wine was included in some hotel packages. All of these sales resulted in a different markup. In addition, some wines were consumed in the cooking process.

A list of missing records includes cash register tapes and guest checks for the bar and restaurant.

Mr. Bevilacqua, according to the lease agreement (section 2.1[b]) signed by Wintergarden, had been the "project supervisor" in the building of the hotel. As stated in his petition, he was active in the management of the hotel at the start of the operation in May 1986 through September 1986, although he states this was as an officer of the general partner, National.

These facts are not contradicted by the submission after the hearing, even if admissible, of a page from an "official statement" for IDA bonds stating that Wintergarden had a management contract with Quality Hotels as managing agent and that a certain Mr. Dugdale was hired as general manager of the hotel.

Notices of determination and demands for payment of sales and use taxes due were issued against National (S910612004E) and Edward U. Bevilacqua (S910612008E) on June 12, 1991 for sales taxes due for the period December 1, 1987 through August 31, 1990 of \$133,225.59, plus penalty of \$33,284.91 and interest of \$27,248.44, for a total amount due of \$193,758.94.

These assessments were recomputed after conference to be \$34,647.17, plus penalty and interest. This amount was attributable as follows: beverages, \$21,021.61; expenses, \$9,874.55; sales tax accrual accounts of \$2,342.16 and \$810.60; and asset acquisitions of \$598.25.

At the hearing, the only witness testifying was the Division of Taxation's ("Division") auditor. Petitioner Edward U. Bevilacqua was not present and had no one to testify on his behalf.

OPINION

In his determination, the Administrative Law Judge concluded that petitioners failed to establish that purchases made by them were exempt from sales tax due to IDA funding. Accordingly, the Administrative Law Judge upheld the audit of the hotel.

Also, the Administrative Law Judge found that petitioner Edward U. Bevilacqua was responsible for the sales taxes assessed against Wintergarden pursuant to Tax Law § 1131(1) since he was a limited partner of Wintergarden.

On exception, petitioner Edward U. Bevilacqua argues that he is not a person required to collect sales tax on behalf of Wintergarden because he did not participate in the day-to-day operations or financial affairs of the management of the hotel; did not prepare or file tax returns; was only in New York State a portion of the audit period; had no role in the financial affairs of the partnership which owned the hotel; was a minority partner in the partnership; did not receive a salary from the partnership or from National; and, as President of National, was not responsible for payment of sales tax.

In its exception, petitioner National argues that, as a corporation, it cannot be imputed with the authority or knowledge of acts of its employees; that an IDA sales tax exemption

extends for the term of the bonds used to finance the IDA project; and that the Division incorrectly computed sales tax liability.

With their briefs, petitioners included several documents allegedly in support of their arguments. Copies of some of these documents had been admitted into evidence at the close of the hearing.

In opposition, the Division argues that petitioner Edward U. Bevilacqua conceded that he was a limited partner of Wintergarden and the president and 45% shareholder of National. Since any member of a partnership is liable for the sales tax due from the partnership, there is sufficient basis in the record to establish that petitioner Edward U. Bevilacqua is responsible for the sales tax liability of Wintergarden. Further, the Division argues that there is no support for the arguments of petitioner National. Accordingly, the Division states that the Administrative Law Judge's determination should be affirmed.

We first deal with petitioners' submission of evidence subsequent to the closing of the record in this matter. In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons, we must follow our policy of not allowing the submission of evidence after the closing of the record and the documents submitted by petitioners with their briefs on exception will not be considered (see, Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

The issues raised by petitioner Edward U. Bevilacqua concerning his liability were each presented to and considered by the Administrative Law Judge. After reviewing all the evidence presented in this case, we find that the Administrative Law Judge correctly and adequately addressed the issue of his liability and we affirm his determination for the reasons stated therein.

Petitioner National offers no authority to support its argument on exception that, as a corporation, it cannot be imputed with the authority or knowledge of acts of its employees nor is this issue of significance here. Tax Law § 1131(1) defines "persons required to collect tax" to include "any officer, director or employee of a corporation . . . who as such officer, director, employee . . . is under a duty to act for such corporation . . . and any member of a partnership." Therefore, the Administrative Law Judge correctly concluded that National, as a partner of Wintergarden, is liable for the sales and use tax owed by the partnership. This liability arises from its status as a partner and not as a result of the authority or knowledge of acts by its payrolled employees. Further, there is no evidence in the record to refute the Division's evidence that the sales tax exemption in connection with the Wintergarden project ceased upon completion of the project, i.e., on or before May 1, 1986, which was prior to the audit period under consideration. Finally, petitioners bear the burden of proof to demonstrate that the Division's assessment was erroneous. Since no evidence has been offered by petitioners on this issue, the audit results must be upheld.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of National Urban Ventures, Inc., Partner of Wintergarden Inn Associates and Edward U. Bevilacqua, Partner of Wintergarden Inn Associates are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of National Urban Ventures, Inc., Partner of Wintergarden Inn Associates and Edward U. Bevilacqua, Partner of Wintergarden Inn Associates are denied; and

4. The notices of determination dated June 12, 1991, as recomputed after conference, are sustained.

DATED: Troy, New York
January 16, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner