STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EDWARD YAGER AND PATRICK McKEON D/B/A CALIFORNIA BREW HAUS	:	DETERMINATION
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.	:	

Petitioners, Edward Yager and Patrick McKeon d/b/a California Brew Haus, 402 Ridge Road West, Rochester, New York 14615, 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, 1981 through November 30, 1984 (File No. 802980).

A hearing was held before Arthur S. Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on June 4, 1987 at 1:30 P.M., with all briefs to be filed by December 14, 1987. Petitioners appeared by Osborn, Reed, Van De Vate & Burke (John A. Ferr, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. During the years in issue, petitioners, Edward Yager and Patrick McKeon, operated a tavern known as the California Brew Haus ("the tavern").

2. On November 15, 1985, the Audit Division 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 the amount 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.

3. In the course of its audit, the Audit 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 thesales and use tax returns. However, the Audit 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 Audit 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.

4. In order to determine the amount of tax due for the years 1982 and 1983, the Audit Division utilized the amount of admission receipts reflected on petitioners' records. The Audit Division determined the level of admission receipts subject to tax for the year 1984 from information provided by the accountant. The Audit 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. Petitioners never filed an amended return to delete the admission fees which had been recorded on their partnership returns as other income (see Finding of Fact "3"). An amended return was considered unnecessary since a corresponding expense was also claimed resulting in no additional income.

SUMMARY OF PETITIONERS' POSITION

10. In their brief, petitioners argue that neither section 1105(d) nor section 1105(f) of the Tax Law rendered them liable for tax; that petitioners were not required to collect tax since they were not vendors; that petitioners and the bands were not co-vendors; that the inclusion of the admission receipts on petitioners' tax returns did not mean that the admission income belonged to petitioners; and that penalty and interest should be waived.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient, the Tax Commission shall determine the amount of tax due on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

B. That resort to the use of external indices to determine the amount of tax due must be based upon an insufficiency of recordkeeping which makes it virtually impossible to determine such liability and perform a complete audit (see Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352). Since there is no evidence that the Audit Division requested an opportunity to examine petitioners' records for the month of December 1981, the use of external indices to calculate the tax due during that month was improper. Accordingly, the assessment of sales and use taxes for the month of December 1981 is cancelled (see Matter of Christ Cella, Inc. v. State Tax Commn., supra).

C. That section 1105(d)(i) of the Tax Law imposes a tax on:

> "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...."

D. That the charge imposed on the patrons of the tavern for admission to the tavern constituted a "cover, minimum, entertainment or other charge" within the meaning of Tax Law § 1105(d)(i). Consequently, said charges were subject to sales and use taxes.

E. That the substance of the transactions involved herein is that petitioners were allowing the bands to collect an entertainment fee on petitioners' behalf. Petitioners' direct interest in the entertainment fee can be seen from the fact that if a sufficient amount of money was not collected, the bands became an expense of the tavern. Additionally, in those contracts wherein the band would receive less than 100 percent of the receipts, if more than a certain amount of money was collected, the tavern would have admission income. Accordingly, petitioners were vendors with respect to the entertainment fees by virtue of their making sales, the receipts from which were taxed by Article 28 of the Tax Law (Tax Law §§ 1101[b][8][i][A]; 1105[d][i]). In view of the foregoing, it is unnecessary to consider whether petitioners and the bands were co-vendors.

F. That if the failure to pay sales and use taxes is due to reasonable cause and not willful neglect, then penalty and that portion of interest which exceeds the amount of interest prescribed by law may be remitted (Tax Law § 1145[a]; 20 NYCRR former 536.1[a]). Petitioners have not presented any evidence which would warrant cancelling penalty or excess interest.

G. That the petition of Edward Yager and Patrick McKeon d/b/a California Brew Haus is granted to the extent of Conclusion of Law "B"; as modified, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated November 15, 1985, is sustained.

DATED: Albany, New York
April 28, 1988

_____/s/_____
ADMINISTRATIVE LAW JUDGE