

STATE OF NEW YORK
DIVISION OF TAX APPEALS

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. : DETERMINATION
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, 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, 1987 through August 31, 1990.

Petitioner Edward U. Bevilacqua, partner of Wintergarden Inn Associates, 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, 1987 through August 31, 1990.

A consolidated hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 5, 1993 at 1:15 P.M. Briefs were due from petitioners on November 30, 1993, and from the Division of Taxation on December 31, 1993. Petitioner National Urban Ventures, Inc. appeared by John Bartolomei, Esq. Petitioner Edward U. Bevilacqua appeared by Ralph J. Genovese,

C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (John E. Matthews, Esq., of counsel).

ISSUES

I. 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.

II. Whether the books and records pertaining to the corporation's beverage sales were adequate and whether the auditor's use of a markup to estimate taxes due was proper.

III. Whether petitioner Edward U. Bevilacqua is a person required to collect sales tax on behalf of Wintergarden Inn Associates and is thus liable for sales tax due under Tax Law § 1133(a).

FINDINGS OF FACT

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

(a) 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.

(b) 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.

(c) 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.

(a) 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.

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

(a) 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.

(b) 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.

(a) 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.

(b) 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's auditor. Petitioner Edward U. Bevilacqua was not present and had no one to testify on his behalf.

CONCLUSIONS OF LAW

A. During the audit period there were no purchases which were exempt from sales tax because of IDA funding. Such an exemption would depend on agreement with the IDA. In this case, the IDA has denied that any exemption extended to the audit period here in question. Petitioners have not cited any provisions of the agreement in evidence which contradict the IDA's statement.

B. The audit of the hotel must be upheld. While petitioners claim that all records were presented to the auditor, the auditor has denied this. A list of allegedly missing records is in evidence. Petitioners have not produced these records for inspection. I must find that they do not exist.

C. Petitioner Edward U. Bevilacqua is responsible for the sales taxes assessed against Wintergarden Inn Associates. Wintergarden is a partnership. Under Tax Law § 1131(1), "persons required to collect the tax" includes "any member of a partnership." This language would appear to include all partners, even limited partners, and Mr. Bevilacqua is a limited partner of Wintergarden. I need not decide whether this result would contradict the New York Partnership Law. That issue was not raised by either party. At any rate, there is another chain of liability which reaches petitioners. The general partner of Wintergarden is National Urban Ventures, who of course is also liable for the sales taxes here since it is involved as a partner. National's principal officer is Mr. Bevilacqua himself. Under Tax Law § 1131(1), a person required to collect the tax also includes:

"any officer . . . of a corporation . . . who as such officer . . . is under a duty to act . . . in complying with any requirement of this article."

Such a requirement, of course, includes paying sales taxes. Mr. Bevilacqua has produced no testimony or evidence that he is not responsible for the taxes of National, which in turn owes the taxes of Wintergarden. Hence, he is within the statute and is himself liable for those taxes.

D. The petitions of National Urban Ventures, Inc. and Edward U. Bevilacqua, partners of Wintergarden Inn Associates, are denied and the notices of determination herein are sustained.

DATED: Troy, New York
June 2, 1994

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE