STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions of BREEZY POINT SURF CLUB, INC.; WILLIAM FERGUSON, OFFICER OF BREEZY POINT SURF CLUB, INC.; THOMAS P. AUGUST, OFFICER OF BREEZY POINT SURF CLUB, INC.; AND SILVER GULL CLUB, INC. for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 1974 through November 30, 1977 and March 1, 1978 through February 28, 1981.	DECISION

Petitioners, Breezy Point Surf Club, Inc.; William Ferguson, Officer of Breezy Point Surf Club, Inc.; Thomas P. August, Officer of Breezy Point Surf Club, Inc.; and Silver Gull Club, Inc., filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 1974 through November 30, 1977 and March 1, 1978 through February 28, 1981 (File Nos. 25700, 25989, 34809 and 35384).

A formal hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, Room 65-51, New York, New York 10047, on May 12, 1983 at 1:15 P.M., with all briefs due no later than October 15, 1983. Petitioners appeared by John R. Horan, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether petitioners Breezy Point Surf Club, Inc. and Silver Gull Club, Inc., collected sales tax from their members and, if so,

II. Whether petitioners Breezy Point Surf Club, Inc. and Silver Gull Club, Inc. are liable for sales taxes returned to their members where more than three years have elapsed from the dates of collections.

III. Whether William Ferguson and Thomas P. August were persons required to collect tax on behalf of Breezy Point Surf Club, Inc. for the period December 1, 1974 through November 30, 1977 thus making them personally liable for any tax rendered due herein.

IV. Whether petitioners Breezy Point Surf Club, Inc. and Silver Gull Club, Inc. are liable for additional sales tax determined due from their restaurant and bar operations for the period March 1, 1978 through February 28, 1981.

V. Whether penalty asserted against all four petitioners for the period December 1, 1974 through November 30, 1977 should be waived due to reasonable cause.

FINDINGS OF FACT

1. Petitioners Breezy Point Surf Club, Inc. ("Breezy") and Silver Gull Club, Inc. ("Silver") are beach clubs. The clubs operate for annual dues paying members only and offer access to a beach and swimming pools, and basketball, handball and tennis courts. In addition, both clubs have cafeterias, restaurants, lockers and cabanas. There is a separate charge for cabana rental; cabanas are rented on a seasonal basis.

2. Prior audits of Breezy and Silver covering the years 1971 through 1974 found that charges for cabana rentals constituted dues subject to sales tax under section 1105(f)(2) of the Tax Law. Accordingly, both petitioners were issued notices of determination and demand for payment of sales and use taxes due. Breezy, believing that the charges for cabana rentals were nontaxable receipts from rentals of real estate, appealed a decision of the State Tax

Commission upholding the assessment issued against it by commencing an Article 78 proceeding. Said proceeding resulted in the Appellate Division overturning the State Tax Commission decision and the granting of Breezy's petition. The State Tax Commission appealed to the Court of Appeals, which affirmed the decision of the Appellate Division (see Breezy Point Surf Club, Inc. et. al. v. State Tax Commission, 67 A.D.2d 760, aff'd 48 N.Y.2d 776). Subsequently, a State Tax Commission decision concerning the same issue for Silver granted Silver's petition based on the above noted case.

3. For the period December 1, 1974 through November 30, 1977, while litigation was still in progress, the Audit Division reviewed the books and records of Breezy and Silver. It was determined as a result of these reviews that sales tax was being charged and collected on cabana rentals and not being remitted to New York State. As a result, on March 14, 1978, notices of determination and demand for payment of sales and use taxes due covering the period December 1, 1974 through November 30, 1977 were issued to Breezy and Silver as follows:

PETITIONER	ADDITIONAL TAX	PENALTY AND INTEREST	TOTAL ASSERTED DUE
Breezy	$107,095.78	$46,814.62	$153,910.40
Silver	$108,823.20	$48,186.05	$157,009.25

In addition, the Notice issued to Breezy included the names of petitioners William Ferguson and Thomas P. August, as the Audit Division had determined that they were responsible officers of Breezy and thus personally liable for any tax not paid by Breezy.

Both notices issued and the audits conducted resulting in such notices were confined to the issue of cabana rentals as the auditors were allowed limited access to the records of Breezy and Silver.

4. For the period March 1, 1978 through February 28, 1981 further audits of the books and records of Breezy and Silver were performed. Estimated tax in the amount of $1,000.00 per quarter was assessed against both Breezy and Silver as it was determined that additional tax was due for their bar and restaurant operations. The record does not show why such determinations were made or how the amounts were arrived at. Tax on fixed asset purchases was determined due for Breezy and Silver in the amounts of $38.02 and $861.73, respectively. The bulk of the tax assessed in the amounts of $41,341.36 and $35,438.15 against Breezy and Silver, respectively, represented sales tax allegedly collected on cabana rentals. As the litigation concerning the issue of taxability of cabana rentals had been concluded at the time of these audits in favor of petitioner Breezy, refunds of approximately one half of the alleged sales tax collected were made to members. The balance of the money collected, which was used to pay the legal fees and administrative expenses in connection with the prior litigation, is the amount assessed and at issue herein and includes the amount collected during the 1978 and 1979 seasons.

The above audit adjustments resulted in two notices of determination and demand dated June 20, 1981 being issued for the period March 1, 1978 through February 28, 1981 as follows:

PETITIONER	ADDITIONAL TAX	SIMPLE INTEREST	TOTAL ASSERTED DUE
Breezy	$53,379.38	$6,057.86	$59,437.24
Silver	$48,299.88	$5,537.87	$53,837.75

5. At the hearing held herein the Audit Division reduced the tax assessed on the first two notices issued on March 14, 1978 to the following:

Breezy, William Ferguson and Thomas P. August - $87,807.40 tax plus penalty and interest.

Silver - $80,407.60 tax plus penalty and interest.

Said reductions eliminated the amounts collected allegedly as sales tax which were returned to the members. However, no reductions were made for amounts returned to members where the refunds were made more than three years after the dates the amounts were collected. This determination by the Audit Division was based on section 1139 of the Tax Law which, in general, imposes a three year statute of limitations upon the application for and granting of refunds and credits. Again, the refunds made to the members were approximately fifty percent of the amounts collected from them purportedly as sales tax.

6. Petitioners did not contest the taxes assessed on the fixed asset purchases.

7. Petitioners and the Audit Division stipulated that the tax due on the bar and restaurant sales should be reduced to $4,192.88 and $1,926.00 for Breezy and Silver, respectively, for the period March 1, 1978 through February 28, 1981.

8. It is the position of the Audit Division that sales tax was collected on the cabana rentals and must, with the exception of amounts returned to members within three years from when they were collected, be remitted to New York State and not used to pay legal and administrative expenses.

9. On January 20, 1975, petitioners Breezy and Silver sent each of their members a letter which enclosed a membership application and price schedule for the 1975 season and presented general information about the clubs. The third paragraph of each letter sent to the Breezy members and the fourth paragraph of each letter sent to the Silver members stated the following:

> "This year the Club has been informed by the New York State Sales Tax Bureau that the cabanas are subject to the 8% New York State Sales Tax. We do not believe this tax is due and we intend to fight it. However, while we do this, we must collect the tax and place it in escrow. If we are successful, the tax will be refunded immediately to the cabana holders."

On the date the letters were sent, neither Breezy nor Silver had been assessed sales tax on the cabana rentals for the years 1971 through 1974, the subject of Breezy's litigation, but had been verbally advised by the Audit Division that such assessments would be made and the basis of them.

10. Members who rented cabanas were invoiced for the rental charges plus 8 percent New York State Sales Tax for the seasons 1975 through 1979.

11. Subsequent to the decision of the Court of Appeals declaring the nontaxability of cabana rentals, members of Breezy and Silver were sent letters which accompanied the initial distribution of 50 percent of the amounts collected as described in Finding of Fact "4" above. The basic letter sent to Silver's members was dated January 20, 1980; the exact date of the basic letter sent to Breezy's members is unknown, but was sent on or about January 20, 1980. Said letters contained the following paragraphs which include the entire body of the letters:

> "We are delighted to report a victory over the New York State Tax Commission which assessed a sales tax on cabana rentals made by the Breezy Point Surf Club, Inc. We opposed the initial assessment, but this did not deter the enforcement agency. Thereupon we brought an administrative proceeding, introducing both documentary evidence and testimony. However, the Tax Commission confirmed the assessment and we were forced to bring an action in the courts to challenge what we believed to be an erroneous and illegal determination.
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> When the case reached the Appellate Division of the Supreme Court, an exhaustive brief in support of our position and another in reply to that submitted by the Attorney General on behalf of the Tax Commission was followed by oral argument, whereupon the Court unanimously ruled in our favor.
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> Unwilling to accept the Court's clear statement of the applicable law, the Tax Commission prevailed upon the Attorney General to appeal this decision of the Appellate Division. Again after briefs and oral arguement (sic), the State's highest court, the Court of Appeals, affirmed the decision of the Appellate Division, all judges concurring.

> We are grateful to you for your support during this long and trying proceeding, which could have had a disastrous effect on our Club. We are happy to be able to express this gratitude in a concrete way by means of a distribution from the legal defense fund which you helped establish. After payment of the costs incurred, were able to return fifty percent of the amounts advanced during the period in question.
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> In this way, you are not only liberated from future levies of the sales tax on cabana rentals, but also rewarded for your support of our efforts in contesting past assessments. We hope that you are as pleased with this outcome as we are.
>
> With best wishes for a happy and prosperous New Year, we remain,"

12. Petitioners, by testimony of petitioner Thomas P. August and Harvey Good, comptroller of both Breezy and Silver, asserted the following:

a) that the clubs never intended to collect sales tax, but only meant to merely establish a legal defense fund in order to fight the 1971 through 1974 assessment of tax on the cabana rentals, and that this action was necessitated by the fact that the clubs, being not for profit organizations, had no assets to liquidate in the event that Breezy was not successful with the litigation;

b) that the 8 percent rate was arrived at arbitrarily and was coincidentally the same rate as the sales tax, and that these amounts were referred to as "tax" in the January, 1975 letters and on the invoices only because the auditors referred to it as tax;

c) that it was decided internally to handle the entire matter in the fashion described above without legal counsel;

d) that upon personal contact with members, when they appeared at the seasons' beginnings to sign up for membership, they were told by the clubs' personnel that the 8 percent charge was a legal defense fund

established in order to fight the tax on cabana rentals and that the money would be held in escrow.

13. The alleged sales taxes collected on the cabana rentals for the periods at issue herein were first put into the clubs' sales tax accrual accounts; however, within one month were transferred into special escrow accounts. The funds in question were kept in bank accounts separate and distinct from other funds belonging to the clubs.

14. William Ferguson and Thomas P. August jointly decided not to pay the escrow funds to New York State.

15. During the periods in question, William Ferguson was president of Breezy and Thomas P. August was Vice President of Breezy. Mr. August asserted that he and William Ferguson, as officers of Breezy, acted reasonably and on the advice of counsel in overseeing the disposition of funds in the escrow account, and fulfilled all duties imposed upon them by law with respect to the obligation of the club for sales taxes. Thomas P. August was not responsible for filing sales tax returns but he signed checks and collected money from customers and members. William Ferguson was responsible for deciding operating policy and which items would be treated as taxable or nontaxable, however he did not collect money. There was no other evidence presented at or subsequent to the hearing concerning the involvement (or non-involvement) of William Ferguson and Thomas P. August with the financial affairs of Breezy.

16. Petitioners' position is that no penalty should be assessed for the period December 1, 1974 through November 30, 1977 for two reasons. First, the issue of cabana rental taxability was being litigated and, in fact, the end result was that cabana rentals were determined by the Courts to be not taxable. Second, the officers of Breezy and Silver never felt that they were collecting

sales tax during the above period and thus asserted that it was reasonably determined by petitioners that no tax was payable to New York State.

CONCLUSIONS OF LAW

A. That section 1137(a) of the Tax Law provides, in pertinent part:

> "Every person required to file a return under the preceding section whose total taxable receipts, amusement charges and rents are subject to the tax imposed pursuant to subdivisions (a), (c), (d), (e) and (f) of section eleven hundred five of this article shall, at the time of filing such return, pay to the tax commission the total of the following:
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> * * *
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> (iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt, amusement charge or rent not subject to tax, and all moneys collected with respect to any receipt, amusement charge or rent subject to tax, purportedly in accordance with a schedule prescribed by the tax commission but actually in excess of the amount stated in such schedule as the amount to be collected..." (emphasis supplied).

The amounts collected consisting of 8 percent of the charges for cabana rentals during the periods at issue were collected purportedly as tax and therefore, with the exception of the amounts returned to the members, must be remitted to New York State. The amounts were invoiced consistently as New York State sales tax at 8 percent of the cabana rentals and the letters sent to the membership on January 20, 1975 did not mention litigation fees and/or administrative expenses and specifically stated that tax was being collected, placed in escrow and would be refunded immediately to the cabana holders if litigation was sucessful. The litigation was sucessful, however the members received, starting on or about January 20, 1980, only approximately 50 percent of the amounts paid by them, said amounts being referred to in letters to the membership as "the legal defense fund which you helped establish."

B. That section 1138(a)(1) of the Tax Law provides, in pertinent part:

> "If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available.... Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same."

The notices of determination did not finally and irrevocably fix the tax since petitioners did apply to the Tax Commission within the ninety day period provided for in section 1138 of the Tax Law, and, therefore, any such tax returned to cabana holders previously collected for the 1975 and 1976 seasons should be deleted from the notices issued on March 14, 1978 in a manner consistent with the method used to delete the amounts returned to the cabana holders collected for the 1977 season.

C. That section 1133(a) of the Tax Law provides that every person required to collect any tax imposed by the sales and use tax law shall be personally liable for the tax imposed, collected or required to be collected under the sales and use tax law.

Section 1131(1) of the Tax Law provides, in pertinent part:

> "'Persons required to collect tax' or ' persons required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

William Ferguson and Thomas P. August were each under a duty to act for Breezy Point Surf Club, Inc. in complying with said statute and are therefore

personally liable for taxes found due herein for such corporation for the period December 1, 1974 through November 30, 1977.

D. That the sales taxes determined due on the restaurant and bar operations of Breezy Point Surf Club, Inc. and Silver Gull Club, Inc. are reduced to $4,192.88 and $1,926.00 respectively for the period March 1, 1978 through February 28, 1981 in accordance with Finding of Fact "7" supra.

E. That the petitioners, Breezy Point Surf Club, Inc.; Silver Gull Club, Inc.; William Ferguson; and Thomas P. August, had reasonable cause for not remitting sales taxes on cabana rentals for the period December 1, 1974 through November 30, 1977; thus the penalties asserted for this period are to be cancelled and interest is to be computed at the minimum statutory rate.

F. That the petitions of Breezy Point Surf Club, Inc.; Silver Gull Club, Inc.; William Ferguson; and Thomas P. August are to be granted to the extent indicated in Conclusions of Law "B", "D" and "E", supra; that in all other respects the petitions are denied and the notices of determination and demand for payment of sales and use taxes due dated March 14, 1978 and June 20, 1981 are sustained.

DATED: Albany, New York

JUN 29 1984

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER