

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
COUNTRY MANOR CATERERS, INC.	:	DECISION
JAMES BRADY AND JOSEPH QUAGLIARIELLO	:	
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 September 1, 1976	:	
through December 15, 1977.	:	

Petitioners, Country Manor Caterers, Inc., c/o James Brady, 204-10 12th Avenue, Rockaway Point, New York 11697 and Joseph Quagliariello, 133 Reid Avenue, Rockaway Point, New York 11697, 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 September 1, 1976 through December 15, 1977 (File No. 33118).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 14, 1983 at 1:15 P.M., with all briefs to be submitted by September 30, 1983. Petitioners Country Manor Caterers, Inc. and James Brady appeared by Michael R. Sonberg, Esq. and petitioner Joseph Quagliariello appeared by Angelo J. Arculeo, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division's use of external indices as a basis for determining the taxable sales of Country Manor Caterers, Inc. was proper.

II. Whether the additional taxable sales resulting from the use of such procedures were correct.

III. Whether James Brady and Joseph Quagliariello were persons required to collect tax on behalf of Country Manor Caterers, Inc. and thus personally liable for sales taxes due from said corporation.

FINDINGS OF FACT

1. Petitioner Country Manor Caterers, Inc. ("CMC") operated a restaurant, bar, snack bar and catering facility at South Shore Golf Course located in Staten Island, New York. The golf course and buildings were owned by the City of New York. The Department of Parks and Recreation leased the premises to CMC.

2. On August 20, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against CMC covering the period September 1, 1976 through December 15, 1977 for taxes due of \$41,563.68, plus penalty and interest of \$25,573.58, for a total of \$67,137.26. Said notice indicated that the assessment was estimated because CMC did not produce books and records for audit.

On the same date, notices were issued to James M. Brady, President and Joseph Quagliariello, Secretary-Treasurer, individually, as officers of CMC under sections 1131(1) and 1133 of the Tax Law for the same amount as above.

3. Upon the initial contact by the Audit Division with CMC, very limited books and records were produced for audit. These records consisted of some purchase invoices, guest checks and bank statements which were filed haphazardly in a cardboard box. The documents were of no value for audit purposes since there were no ledgers, journals or any other original books of entry.

The auditor, however, listed purchases of liquor, beer, soda and food from the invoices for the period April, 1977 through September, 1977. Estimated markup percentages were applied to each category of purchases to determine

sales of \$103,025.00. The auditor also contacted the Department of Parks and Recreation and obtained the sales information furnished by CMC to the Department for purposes of determining the rent (rent was based on a percentage of gross sales). This information showed that CMC's gross sales for the period April, 1977 through July, 1977 were \$111,179.00. Because of the disparity in the two sales figures, the auditor concluded that the records made available were unreliable.

The auditor, therefore, estimated CMC's sales to be \$130,000.00 per reporting period. This amount was determined by using the average gross sales reported on sales tax returns filed for the period June 1, 1975 through August 31, 1976 which was \$125,293.00. This amount was increased to \$130,000.00 to account for inflation. The auditor was advised that the restaurant was closed by the Department of Parks and Recreation in approximately the middle of December, 1977. Consequently, the estimated quarterly sales were prorated for fifteen days in December.

4. CMC did not file sales tax returns for the periods ending February 28, 1977, August 31, 1977, November 30, 1977 and December, 1977. The return for the period ending November 30, 1976 was filed on August 31, 1977; therefore, the assessment covering that period was timely.

5. A pre-hearing conference was held on January 20, 1982, at which time CMC indicated that its books and records were available for audit at the offices of the Department of Parks and Recreation. The auditor examined such records which included purchase invoices and guest checks for certain months (some within and some outside the audit period) and other documents not related to sales tax. The additional records provided were inadequate for verifying taxable sales reported and, therefore, no adjustment was made to the assessment.

6. The Department of Parks and Recreation closed CMC's business operations on March 29, 1977 for failure to pay back rent and maintain required insurance. CMC negotiated an agreement with the City of New York to pay the indebtedness and reopened the business on April 6, 1977.

7. The Department of Parks took CMC's books and records for the period March 1, 1975 through March 31, 1977 on April 19, 1977. The receipt stated "received from you three ledger books for the restaurant and catering facility". On April 22, 1977, CMC was advised that the Department examined the records and determined that the gross sales recorded therein were in agreement with the Department's summary record of sales.

The records referred to above show the following sales:

March 1, 1975 to December 31, 1975	-	\$423,905.10
January 1, 1976 to December 31, 1976	-	\$454,220.38
January 1, 1977 to March 31, 1977	-	\$ 40,342.12

8. On December 2, 1977, Con Edison turned off the power to CMC's facilities. That evening, the fire department ordered the building vacated. On December 9, 1977, the Department of Parks evicted CMC from the premises. CMC's last day of operation was December 2, 1977.

9. CMC kept its books and records on the business premises. The Department of Parks and Recreation took possession of and padlocked the premises on December 9, 1977 and did not permit entry by CMC to remove any of its personal property. An inventory was taken immediately after the building was seized. Listed on the inventory was a metal filing cabinet containing, among other things, two ledger books.

CMC argued that prior to the business being closed by the Department of Parks and Recreation, it maintained complete and adequate books and records. A bookkeeper was employed who was responsible for preparing such records, as

well as preparing monthly sales reports for submission to the Department of Parks and Recreation. CMC went on to argue that the responsibility for the lack of records lies entirely with the Department of Parks and Recreation and, therefore, concluded that the estimate procedures used by the Audit Division were improper. Furthermore, CMC took the position that the sales reports submitted to the Department of Parks and Recreation should have formed the basis for the assessment.

At the hearing, CMC submitted sales reports for March, 1977, April, 1977, May, 1977, June, 1977 and July, 1977 which indicated the following gross sales:

March	\$13,512.02
April	17,908.45
May	33,616.00
June	36,512.02
July	23,141.85

10. CMC's highest volume sales months were June, July and August.
11. Petitioner James Brady was president and a 50 percent stockholder of CMC. He managed the day-to-day business and financial affairs of the corporation. Mr. Brady did not contest his personal liability for the taxes determined due from CMC.
12. Petitioner Joseph Quagliariello was secretary-treasurer and a 50 percent stockholder of CMC. Mr. Quagliariello devoted the majority of his time to the operation of a fence business he owned. He was primarily an investor in CMC and left the day-to-day management of CMC to James Brady. He did, however, spend approximately two nights a week in the restaurant. While at the restaurant, his activities typically included auditioning the entertainment.

Mr. Quagliariello did not prepare or sign tax returns; he was an authorized signatory on the business bank account, however, he seldom if ever signed checks.

CONCLUSIONS OF LAW

A. That the books and records available for audit were inadequate and insufficient for verifying taxable sales or to determine such sales with any exactness. Accordingly, it was proper for the Audit Division to determine CMC's tax liability by resort to other indices pursuant to section 1138(a) of the Tax Law (Matter of Urban Liquors v. State Tax Commission, 90 A.D.2d 576; Matter of Hanratty's 732 Amsterdam Tavern, Inc. v. State Tax Commission, 88 A.D.2d, 1028, mot. for lv. to app. den. 57 N.Y.2d 608).

B. That the periods used to estimate average taxable sales (Finding of Fact "3") gave excessive weight to CMC's highest sales months. Therefore, the period ending August 31, 1975 shall be deleted from the computation and the average taxable sales per period are revised to \$120,743.00. Moreover, the taxable sales shall be adjusted to reflect that the business was closed from March 29, 1977 to April 6, 1977 (Finding of Fact "6") and ceased operations completely as of December 2, 1977 (Finding of Fact "8").

C. That the Audit Division reasonably calculated the taxes due and that, except as indicated in Conclusion of Law "B", CMC failed to overcome its burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

D. That section 1131(1) of the Tax Law provides:

"'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;... 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."

That petitioner James Brady was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and, therefore, is personally liable for the taxes due from CMC in accordance with section 1133(a) of the Tax Law.

Petitioner Joseph Quagliariello was not a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and thus bears no personal liability for the taxes due from CMC.

E. That the petition of Country Manor Caterers, Inc. and James Brady is granted to the extent indicated in Conclusion of Law "B"; the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued August 20, 1980, accordingly.

That the petition of Joseph Quagliariello is granted and the notice issued to said petitioner is cancelled.

DATED: Albany, New York

MAY 25 1984

STATE TAX COMMISSION

Roderick W. Cline
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark F. Zier
COMMISSIONER