

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BRYAN & ROSE, INC.	:	DECISION
T/A MY FATHER'S PLACE and	:	
MICHAEL EPSTEIN, PRESIDENT	:	
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 June 1, 1977	:	
through November 30, 1981.	:	

Petitioners, Bryan & Rose, Inc., t/a My Father's Place and Michael Epstein, President, 4 Union Street, Roslyn, New York 11576 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 period June 1, 1977 through November 30, 1981 (File Nos. 39306 and 39307).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 6, 1985 at 1:15 P.M., with all briefs to be submitted by August 10, 1985. Petitioners appeared by Norman Lippman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly determined sales of food, beer, liquor and wine based on an examination of available books and records.
- II. Whether admission charges to performances presented at My Father's Place were subject to sales tax.

FINDINGS OF FACT

1. Petitioner Bryan & Rose, Inc. (B & R) operated an establishment known as My Father's Place located at 19 Bryant Avenue, Roslyn, New York. B & R

presented live musical performances by various recording artists. Occasionally, B & R had comics and one act plays. B & R was open only on those nights when performances were scheduled. There were two performances nightly at 8:30 P.M. and 12:00 A.M. The doors opened at 7:30 P.M. for the first performance. After the show all patrons were required to leave and purchase another admission ticket in order to attend the second performance. The doors would reopen at 11:30 P.M. for the second performance. Tickets for any of the shows were available at B & R's ticket office outside the premises or through Ticketron. B & R offered food, alcoholic and non-alcoholic beverages for sale. However, there was no minimum or cover charge. There was a bar in the back of the premises with seating for approximately fifty people. The stage for the performers was at the opposite end of the building. In between were large oak tables and metal chairs. Each table accommodated approximately 25 people. There were no facilities for dancing.

2. On June 18, 1982, as the result of an audit, the Audit Division issued notices of determination and demand for payment of sales and use taxes due covering the periods June 1, 1977 through November 30, 1980 and December 1, 1980 through November 30, 1981 for taxes due of \$166,801.50 and \$43,887.23, respectively, plus accrued interest thereon. On the same date, notices for the same amounts were issued against Michael Epstein, President of B & R. Petitioner Michael Epstein did not contest his personal liability for any taxes determined due from B & R.

3. Michael Epstein, on behalf of B & R executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1977 through February 29, 1980 to September 20, 1982.

4. On audit, the Audit Division analyzed petitioner's cash receipts and cash disbursements journals and determined reported markup percentages of 38.3 percent on food and 275.48 percent on beer and liquor. These percentages appeared low to the auditor based on his experience with audits of similar businesses. Moreover, petitioner did not have cash register tapes, guest checks or any other records available that would serve as a verifiable record of taxable sales. Since the books and records were deemed inadequate, the Audit Division performed markup tests for food, beer and liquor in order to verify the taxable sales reported on sales tax returns. The cash disbursements journal did not separate beer and liquor purchases. Therefore, purchase invoices were analyzed for the period September 1, 1979 through February 29, 1980 which showed the following percentages: beer - 30.98%; wine and liquor - 62.88%; soda - 2.65%; and supplies - 3.49%. Purchases for February, 1980 were used for the markup test. The combined liquor and wine markup was 403.58 percent. The Audit Division used a 1½ ounce serving size for liquor and allowed 15 percent for spillage. The beer markup was 331.77 percent. The food markup was estimated to be 175 percent based on experience with audits of similar businesses which sold similar food items. After October 1979, the food operation was contracted to a concessionaire. The soda markup was estimated to be 100 percent based on prior audit experience. Only 25 percent of the soda purchases were marked up. The remaining 75 percent was considered used as a mixer with liquor drinks. The foregoing markup percentages were applied to applicable purchases for the audit period from the cash disbursements journal which resulted in the following sales: food - \$184,841.03; beer - \$641,754.99; liquor and wine - \$1,217,524.00; and soda - \$6,356.98. Before applying the markups, the Audit Division reduced food purchases 10 percent and beverage purchases 5 percent to allow for consumption

by employees and performers. The combined sales of food and beverages amounted to \$2,353,124.27.

5. B & R did not collect or pay any sales tax on admission receipts. The Audit Division held all such receipts as taxable sales after B & R received an Advisory Opinion issued by the Technical Services Bureau¹. Total admissions for the audit period were \$2,366,277.70. Total audited taxable sales amounted to \$4,718,401.97. The Audit Division also determined use taxes due on the following purchases: expenses - \$41,516.89; fixed assets - \$21,485.28; and self-consumed beverages - \$29,900.77. The total taxes due on the above areas of deficiency were \$339,601.14 as compared to tax paid of \$128,912.41, leaving a difference of \$210,688.73.

6. B & R took exception to the markup percentages computed for liquor, beer and food. It estimated that the serving size of liquor was 1 3/4 ounces which would reduce the liquor markup to 300 percent and that the food markup was 125 percent. B & R however, adduced no evidence to show that the markup percentages used by the Audit Division were erroneous. With respect to the admission charges, B & R took the position that such charges were for admission to dramatic or musical arts performances which are excluded from the tax imposed under section 1105(f)(1) of the Tax Law.

7. B & R placed menus on each table. The menu for periods prior to October 1979 offered a limited choice of items such as hamburgers, french fries, onion rings, chicken and cheese platters. (No menus were submitted for periods when the food service was operated by a concessionaire). It was

1 Said opinion concluded that B & R operated a roof garden, cabaret or similar place and the amount paid for admission thereto was subject to the tax imposed under section 1105(f)(3) of the Tax Law.

B & R's practice not to provide table service for food and beverages once the performance started. However, the bar remained open during most performances.

8. Total receipts from the sale of food and beverages as determined by the Audit Division were equal to admission receipts during the period under audit.

9. B & R advertised its performances in local newspapers and entertainment guides. The ads occasionally made reference to the availability of food. However, patrons did not go to B & R to have dinner without watching the show.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement. B & R did not have cash register tapes or any other verifiable record of receipts available for audit. The failure to retain such documents justifies the Audit Division's use of markup percentages to determine taxable sales (Matter of Murray's Wines and Liquors v. State Tax Commission, 78 A.D.2d 947; Matter of McCluskey's Steak House, Inc. v. State Tax Commission, 80 A.D.2d 713). Accordingly, the Audit Division properly determined B & R's tax liability pursuant to section 1138(a) of the Tax Law.

B. That petitioners have the burden of proving that the amount of additional tax assessed on sales of food and beverages was erroneous (Matter of Urban Liquors Inc. v. State Tax Commission, 90 A.D.2d 576). Petitioners failed to sustain this burden.

C. That section 1105(f)(3) provides for the imposition of sales tax on:

"The amount paid as charges of a roof garden, cabaret or other similar place in the state."

Section 1101(d)(4) of the Tax Law defines the phrase "charge of a roof garden, cabaret or other similar place" to mean:

"Any charge made for admission, refreshment, service or merchandise at a roof garden, cabaret or other similar place."

Section 1101(d)(12) defines the terms "roof garden, cabaret or other similar place" as:

"Any roof garden, cabaret or other similar place which furnishes a public performance for profit."

Such terms are further defined in 20 NYCRR 527.12(2) as follows:

"(ii) Any room in a hotel, restaurant, hall or other place where music and dancing privileges or any entertainment, are afforded the patrons in connection with the serving of food, refreshment or merchandise".

D. That section 1105(f)(1) of the Tax Law excludes charges for admission to dramatic or musical arts performances from the tax imposed on admissions under said section. Section 1101(d)(5) of the Tax Law defines "dramatic or musical arts admission charge" as:

"Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance."

E. That B & R was a "roof garden, cabaret or similar place" as defined in section 1101(d) 12 of the Tax Law and 20 NYCRR 527.12 (2). Accordingly, the amounts paid for admission to such establishment are subject to the tax imposed under section 1105(f)(3) of the Tax Law.

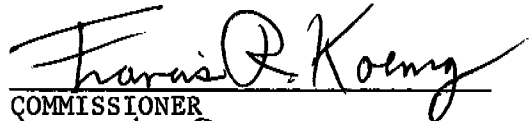
F. That the petitions of Bryan & Rose, Inc. t/a My Father's Place and Michael Epstein, individually and as president, are denied and the notices of determination and demand for payment of sales and use taxes due issued June 18, 1982 are sustained.

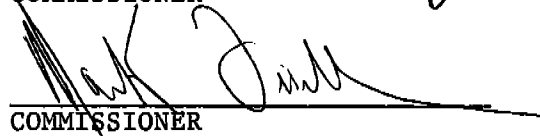
DATED: Albany, New York

JAN 28 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER