

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LEONARD SANDBERG,
PRESIDENT OF SANDREST CORP. D/B/A THE STORK CLUB :

DECISION

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Periods March 1, 1978
through August 31, 1978 and December 1, 1978
through May 31, 1979.

Petitioner, Leonard Sandberg, President of Sandrest Corp. d/b/a The Stork Club, 2224 Embassy Drive, West Palm Beach, Florida 33401, 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 periods March 1, 1978 through August 31, 1978 and December 1, 1978 through May 31, 1979 (File No. 45300).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 5, 1987 at 10:45 A.M. Petitioner appeared by Philip H. Kalban, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether the New York State Tax Commission has the authority to hold a hearing in this matter.

11. Whether petitioner is entitled to a refund of penalty and interest.

FINDINGS OF FACT

1. On May 20, 1980, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due to Leonard Sandberg which stated tax due of

\$68,412.28, penalty of \$15,454.71 and interest of \$12,288.97, for a total amount due of \$96,155.96. This amount was found due for the periods ended May 31, 1978, August 31, 1978, February 28, 1979 and May 31, 1979 (the "audit period").

2. For the periods ended May 31, 1978 and August 31, 1978, forms ST-100, New York State and local sales and use tax returns were filed with only partial payment of the tax stated. For the periods ended February 28, 1979 and May 31, 1979, petitioner filed forms ST-810, quarterly returns for part-quarterly filers, failing to remit any tax with regard to the former period and only partially remitting the amount set forth as due for the latter period. All four returns were signed by Leonard Sandberg, petitioner herein.

3. Petitioner was the secretary and treasurer of Sandrest Corp. until sometime in 1979 when he became president. Petitioner has never contended that he was not a responsible officer of Sandrest Corp.

4. Sandrest Corp. operated a restaurant known as The Stork Club located at 112 Central Park South in New York City. The club closed sometime in the spring of 1979.

5. Petitioner does not dispute the total tax due as stated on the Notice and Demand for Payment of Sales and Use Taxes Due issued on May 20, 1980, but does dispute the propriety of the penalty and interest assessment.

6. On April 30, 1981, petitioner made a partial payment of \$25,000.00. On July 8, 1981, petitioner made a second payment of \$9,000.00. However, because of financial "adversity" alleged to be due to loss of business resulting from alleged improprieties and embezzlement of funds by an employee, loss of income for the year 1979 and severe illness, no further payments were made towards the outstanding assessment. The New York State Department of Taxation

and Finance obtained a warrant against petitioner and levied against one of his bank accounts, collecting \$78,316.37, which constituted the entire outstanding balance due at that time. This levy took place on March 12, 1982.

7. Immediately prior to the levy, petitioner learned that the manager employed by Sandrest Corp. for The Stork Club had been arrested for alleged credit card fraud and entering the United States as an illegal alien. The employee, Robert James Jackson, has since been deported from this country.

8. Petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax on August 5, 1982, received by the Department of Taxation and Finance on August 16, 1982, seeking \$43,904.39, which amount was set forth on the compliance agent's levy as "statutory additions". By letter dated June 8, 1983, the Audit Division denied petitioner's application for refund and informed petitioner that he had 90 days from the date of the letter to apply for a hearing in accordance with the provisions of Tax Law § 1139(b).

9. Petitioner, by his representatives, Booth, Lipton & Lipton, protested the denial of his refund in a letter timely received by the Tax Appeals Bureau on July 8, 1983.

CONCLUSIONS OF LAW

A. That the State Tax Commission has jurisdiction to hear this matter pursuant to the provisions of Tax Law § 1139(b), which states that the determination to deny petitioner's application for refund or credit, in whole or in part, shall be final and irrevocable:

"unless the applicant shall, within ninety days after the mailing of notice of such determination, apply to the tax commission for a hearing."

This situation is distinguishable from that in the case of Hall v. New York State Tax Commission, 108 AD2d 488, which held that the Tax Commission did not have authority under Tax Law § 1138(a)(1) to hold hearings concerning the assessment of sales and use taxes due from a petitioner for a period for which a correct and sufficient return was filed but no payment made. The Hall case also held that jurisdiction to hold such a hearing was not conferred by Tax Law § 171(21). The instant situation clearly falls within section 1139(b) as stated above and the Commission is authorized to hold a hearing on the merits of this matter. All amounts due were paid and a proper refund application filed. This hearing concerns that claim.

B. That during the period in issue, Tax Law § 1145(a)(1) granted the Commission the discretion to remit all or any part of assessed penalty and that portion of interest that exceeds the minimum amount. Although the language changed between 1978 and 1979, the salient provisions remained the same. The prior provision authorized the remittance of penalty and interest if the Tax Commission was satisfied that the delay in payment of taxes was excusable and the later provision provided that remittance could be authorized in the discretion of the Commission when the Commission determined that the failure or delay in paying taxes was due to reasonable cause and not due to willful neglect.

C. That petitioner has not demonstrated that there was reasonable cause for his failure to pay over taxes due within the time required by Article 28 of the Tax Law. Petitioner's illnesses took place long after the audit period, as did his good faith negotiations with and payments to the Department of Taxation and Finance. Further, claims of embezzlement and fraud by an employee were not substantiated and, in any event, as a responsible officer who signed all the


returns for the periods in issue, petitioner should have known what payments of sales tax were being made during the periods in issue.


D. That the petition of Leonard Sandberg is denied and the denial of the claim for refund dated June 8, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 12 1987


PRESIDENT


COMMISSIONER


COMMISSIONER