

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition  
of

RICHARD STRINGER AND PATRICIA STRINGER  
D/B/A BARREL TAVERN

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 Period June 1, 1979 :  
through May 31, 1982.

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Petitioners, Richard Stringer and Patricia Stringer, d/b/a Barrel Tavern, P.O. Box 340, Dexter, New York, 13634 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 June 1, 1979 through May 31, 1982 (File No. 47987).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on August 15, 1986 at 9:00 A.M., with additional evidence to be submitted by September 15, 1986. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Michael Infantino, Esq., of counsel).

ISSUES

I. Whether a default order should be taken against the Audit Division because of the Law Bureau's failure to serve an answer on the petitioners within sixty days from the date the Secretary to the State Tax Commission acknowledged receipt of an acceptable perfected petition.

II. Whether petitioners are liable for penalty and interest determined to be due.

FINDINGS OF FACT

1. On June 3, 1983, as the result of a field audit, the Audit Division issued against petitioners, Richard Stringer and Patricia Stringer d/b/a Barrel Tavern, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1979 through ~~May~~ 31, 1982, asserting a tax due of \$4,909.94, plus penalty ~~of~~ \$1,175.42 and interest of \$1,535.34, for a total amount due ~~of~~ \$7,620.70.

2. Mr. and Mrs. Stringer operated a small tavern, serving legal beverages and bar snacks. They initially registered as vendors, using the name Barrel Tavern, on June 22, 1977; however, the business was moribund until June 1979.

3. On audit, it was determined that Barrel Tavern actively began doing business in June 1979, but failed to file any sales tax returns or to remit sales tax to the State. In June 1982, Mr. and Mrs. Stringer obtained a second certificate ~~of~~ authority, registering as Fun Spots, Inc. Their registration indicated that they began doing business in June 1982.

4. Because petitioners did not have sales journals or cash register tapes, the auditor deemed the books and records to be inadequate for the purpose of determining taxable sales. Using a test period and markup of purchases procedure, the auditor estimated taxable sales for the period of \$70,142.00 with a tax due on that amount of \$4,909.94. The auditor apportioned the total tax due to the twelve quarters in the audit period, assessing tax of \$433.23 in each ~~of~~ the first eleven quarters and \$144.41 in the final quarter.

5. The determination of tax due followed an informal conference between the Audit Division and Mr. and Mrs. Stringer held on March 10, 1983. On March 28, 1983, Mrs. Stringer met with the Audit Division a second time, and she executed a Consent to Payment of Tax. Mr. Stringer also executed a Consent to Payment of Tax.

6. The consent form signed by Mrs. Stringer includes two statements as follows:

"I agree to submit with this consent a remittance payable to the 'New York State Tax' for the full amount **of** tax plus penalty and/or interest, which is computed to the date of this consent."

"After issuance of Notice and Demand (AU-16.1) which includes tax, penalty and/or interest accrued, **I** agree to pay the amount due."

7. On the consent signed by Mrs. Stringer, the second **of** the two statements quoted above was checked.

8. At the time the consent form was executed, tax due, plus penalty and interest, amounted to approximately \$6,700.00. The Stringers agreed to the total amount of tax assessed for the audit period. However, they argued that audited sales should have been apportioned in such a way as to reflect the fact that sales had increased over the audit period and that the Audit Division's failure to do **so** had resulted in an overstatement of interest and penalty. They calculated their **own** liability at approximately \$5,700.00, an amount which **was intended by them to include interest and penalty, and offered the auditor a** check in this amount in satisfaction of the entire assessment. The auditor refused the check.

9. At hearing, Mr. and Mrs. Stringer continued to dispute the imposition of penalty and interest, but they did not present any documentary evidence to show that the tax assessed within each quarter was erroneous. Furthermore, they argued that their offer to pay tax plus a portion of the interest should have been accepted and should have stopped interest from accruing beyond that point.

10. Mr. Stringer filed a perfected petition on July 3, 1985. The Law

CONCLUSIONS OF LAW

A. That in light of petitioners' failure to file returns and to maintain adequate books and records, the Audit Division was warranted in estimating taxable sales on the basis of whatever information was available to it (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, cert denied 355 US 869). Furthermore, petitioners agreed that the total tax assessed was correct, and they presented no documentary evidence to establish that the audit methodology resulted in an overstatement of interest and penalty due.

B. That there is no provision in the Tax Law authorizing the State Tax Commission to cancel or reduce minimum interest on tax determined to be due and remaining unpaid.

C. That the State Tax Commission may remit penalties and that portion of the interest exceeding the statutory minimum, if it determines that failure to comply with the Tax Law was due to reasonable cause and not to willful neglect (Tax Law §1145). Petitioners did not establish that reasonable cause existed for their failure to file returns or remit tax due for a period of approximately three years.

D. That inasmuch as petitioners were not prejudiced by the Law Bureau's failure to file an answer within sixty days, there is not sufficient ground for the taking of a default judgment against the Audit Division.

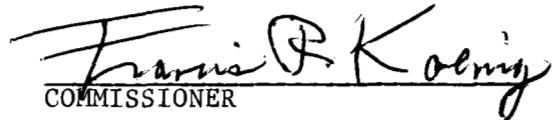
E. **That** the petition of Richard Stringer and Patricia Stringer d/b/a Barrel Tavern is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on June 3, 1983 is sustained.

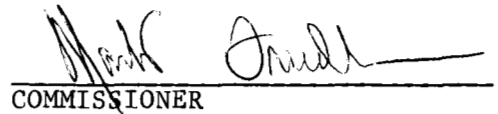
DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987

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PRESIDENT

  
COMMISSIONER

  
COMMISSIONER