

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MICHAEL IRA ASEN,
OFFICER OF WINGS ON WOOSTER STREET CAFE, LTD. :

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 September 1, 1981 :
through August 31, 1983.

Petitioner, Michael Ira Asen, 24 Willow Place, Brooklyn, New York 11201, 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, 1981 through August 31, 1983 (File No. 51823).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 15, 1986 at 1:30 P.M., with all briefs to be submitted by August 22, 1986. Petitioner appeared by Moore, Berson, Lifflander & Mewhinney (Howard I. Rich, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether petitioner was a person required to collect tax on behalf of Wings on Wooster Street Cafe, Ltd. and is thus personally liable for said corporation's unpaid sales tax.

II. If so, whether the amount assessed against petitioner was correct.

FINDINGS OF FACT

1. Wings on Wooster Street Cafe, Ltd. was selected for audit by the Audit Evaluation Bureau as part of a pilot program for third party verification of purchases.

2. The business was no longer in operation when the field audit was commenced. No books or records were available.

3. The auditor visited the premises at 76 Wooster Street in the SoHo section of Manhattan and found that it was being renovated for a new owner. At the time of his visit, the restaurant had two levels: upstairs, there were four tables with 10 chairs, one cash register and a bar with 14 seats; downstairs, there were 24 tables with seating for 86 and one cash register.

4. The auditor used the Restaurant Industry Operations Report of the National Restaurant Association for 1982, which listed the average income per seat for food for a European/Continental upper quartile restaurant to be \$6,110.00. Multiplying this figure by the 86 seats resulted in \$525,460.00 in gross food sales for the first year of operation. The amount of gross food sales for the second year was based on the same method with a 9 percent inflation increase. Total audited food sales were \$1,098,211.00.

5. Beer, wine and liquor purchases were furnished by the suppliers pursuant to the third party verification program. Purchases were \$199,526.00 for the entire audit period. The purchases were marked up 350 percent resulting in additional beer, wine and liquor sales of \$897,867.00 for the audit period.

6. Combined audited food sales and audited beer, wine and liquor sales were \$1,996,080.00. As the corporation had reported only \$166,416.00 in

taxable sales, taxable sales were found to have been underreported by \$1,829,665.00 and a sales tax deficiency of \$150,947.38 was calculated.

7. Petitioner Michael Ira Asen was, and is, an attorney at law. In 1980, he was a member of a New York City law firm when one of his partners, Howard Finger, asked him if he was interested in becoming involved in a new restaurant as an investor and attorney. Petitioner said he was interested.

8. Mr. Finger introduced petitioner to Donald Kulick and Robert Chandler and the four individuals agreed to start the restaurant.

9. Petitioner was named prssident, Mr. Finger treasurer, Mr. Chandler secretary and Mr. Kulick vice president.

10. Mr. Kulick was in the lumber business and was to provide the lumber and hire the general contractor for the renovation **of** the premises. He was also to supply most **of** the start-up capital.

11. Mr. Chandler was to place a second mortgage on his house and supply capital.

12. Mr. Finger was to supply capital, was to set up the finances of the corporation and was **to** be in charge **of** the day-to-day operations **of** the restaurant.

13. Petitioner was to supply capital and to act as attorney.

14. The corporation was formed by Howard Finger. No stock was ever officially issued and evidently there was no definite breakdown of ownership interests at the time of the formation of the entity. The shares were to be apportioned later based on the relative contributions of capital and labor **of** the parties.

15. Petitioner and Mr. Kulick were the original applicants on the corporation's liquor license. Within about three months after the application was filed, the application was amended to include Mr. Chandler and Mr. Finger as principals.

16. The corporation's books and records were set up by a firm of certified public accountants. The accountants prepared corporation tax returns for the fiscal year ending September 30, 1981 showing that the corporation was inactive at that time. The books and records were maintained by the corporation's manager, Nick Mercorella. An accountant from the certified public accounting firm came into the business premises once a month and prepared the payroll tax returns and sales tax returns. The returns were given to the manager for filing. In or about May of 1982, the accountants were dismissed.

17. On or about November 5, 1981, the corporation opened a checking account at the Bellmore, Long Island branch of the National Bank of North America. The address of the corporation for statement mailing purposes was in care of Howard Finger at his home in Bellmore.

18. The restaurant opened for business on October 31, 1981 and was initially successful. Toward the end of 1982, however, business slackened.

19. Late in 1982, petitioner met with the restaurant's manager, Mr. Mercorella, and was shown a list of arrears owed to suppliers. Petitioner was asked to contact the suppliers and to work out a payment plan so that the business could continue to receive supplies.

20. The manager agreed to send all checks from credit card companies to be deposited in petitioner's law firm's escrow account and all check disbursements were to be drawn from that account. The corporation's checking account at the Bellmore branch of the National Bank of North America was closed on or about

November 19, 1982. Although some cash was occasionally deposited in the escrow account, the amount of cash deposits was **so** small that it would appear that the manager retained most of the cash for day-to-day operating expenses or for some other reason (Finding of Fact "28", infra). Some sales tax payments were made from the escrow account.

21. Business continued to fall off and the restaurant was closed on or about July 1, 1983.

22. On September 1, 1983, the corporation contracted to sell the business to one Nancy Guerrini for \$75,000.00 in cash and \$4,000.00 per month for the balance of its ten year lease. Mrs. Guerrini and her husband, Joseph Guerrini, were given a management agreement **so** that they could operate the restaurant until they could get their own liquor license.

23. Mr. and Mrs. Guerrini operated the restaurant for about six weeks and found that it was not profitable. The contract was evidently cancelled.

24. On October 20, 1983, the corporation filed a petition for bankruptcy under Chapter **XI** of the Bankruptcy Act.

25. In January or February 1984, the Bankruptcy Court converted the Chapter **XI** petition to a Chapter VII bankruptcy. As there was no buyer for the business and there were no assets other than the lease, the lease was surrendered to the landlord.

26. Petitioner at no time had the books and records of the corporation and, in fact, had to subpoena the corporation's bank records from the National Bank of North America in order to prepare for the hearing.

27. The banking records confirm that the corporation had substantially underreported sales. Analysis of the bank deposits of the corporation's account at the National Bank of North America showed the following:

<u>Quarter Ended</u>	<u>Deposits</u>
2/82	\$336,297.28
5/82	494,070.75
8/82	213,179.81
11/82	25,525.02

28. The deposits in the Finger & Asen escrow account on behalf of the corporation were \$272,520.18. Of this amount, \$10,412.00 represented cash deposits, the balance, \$262,108.18, represented credit card payments.

29. **The manager of the restaurant drew a check for \$25,897.98 payable to New York State Sales Tax dated March 12, 1982, but never remitted it.**

30. On February 24, 1984, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner in the amount of \$150,947.38 in tax due and \$29,330.72 in penalty, plus interest. The reason for the **assessment was that petitioner was deemed to be personally liable as an officer of Wings on Wooster Street Cafe, Ltd.**¹

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in pertinent part, as follows:

"Liability for the tax -- (a) Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

B. That during the period at issue, section 1131(1) of the Tax Law provided as follows:

"(1) 'Persons required to collect tax' or 'person 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

1 Petitioner was referred to in the notice as "Michael Ina Asten",

for such corporation in complying with any requirement of this article and any member of a partnership."

C. That petitioner, Michael Ira Asen, while nominally president of the corporation, was not a person required to collect tax on behalf of Wings on Wooster Street Cafe, Ltd. prior to the time he assumed control over funds deposited for the corporation in his firm's escrow account. Prior to that time, petitioner was primarily an investor and the corporation's attorney; he was not involved in the day-to-day management of the business. On or shortly before December 1, 1982, however, petitioner became aware of the corporation's financial difficulties and he participated in the payment of creditors from that time on.

D. That since no books and records were available, it was proper for the Audit Division to estimate sales tax pursuant to section 1138(a) of the Tax Law. The method selected by the auditor, while perhaps valid on a long-term basis such as the entire audit period, is not necessarily accurate with respect to the individual tax quarters. For example, the business was in operation for only the first month of the first quarter assessed and no allowance was made for that fact in the assessment. Sales were substantially higher than estimated, however, for the second and third quarters in operation, as can be seen from the bank deposits. After that, sales tapered off significantly.

E. That for purposes of petitioner's liability it is necessary to estimate sales for the period December 1, 1982 through June 30, 1983. The sales for this period of time are obviously much lower than for the earlier quarters; however, they are not necessarily confined to the escrow account deposits. The business certainly had cash receipts during the period, not just the checks for credit card reimbursement. It is hereby determined that based on the type of restaurant involved, credit card sales of \$262,108.18 (Finding of Fact "28")

equalled 50 percent of total sales. Accordingly, taxable sales for the period December 1, 1982 through June 30, 1983 were \$524,216.36 and petitioner's liability for tax is reduced to tax on said amount, less payments of tax made for such period.


F. That in view of the unusual circumstances under which petitioner became a person required to collect tax and in view of his well intentioned but faulty efforts to resolve the corporation's difficulties and to pay sales tax, penalty is cancelled and only minimum interest is to be imposed.

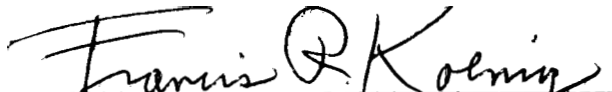
G. That the petition of Michael Ira Asen is granted to the extent that his liability is reduced as per Conclusions of Law "E" and "F" and that except as so granted, the petition is otherwise denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER