

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

SYLDOR RESTAURANT, INC. : 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, 1981
through Yay 31, 1984.

Petitioner, Syldor Restaurant, Inc., c/o Samuel J. Grabel, 1633 East 29th
Street, Brooklyn, New York 11229, 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, 1981 through Yay 31, 1984 (File No. 54987).

A 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
October 21, 1986 at 9:15 A.Y. Petitioner appeared by Samuel J. Grabel, CPA.
The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of
counsel).

ISSUES

I. Whether the Audit Division correctly determined the value of furniture,
fixtures and equipment transferred in the **bulk** sale of petitioner's business
assets.

11. Whether the bulk sale of petitioner's business assets was cancelled by
virtue of the purchaser's default in payment of certain promissory notes
provided in the contract of sale.

FINDINGS OF FACT

1. Petitioner, Syldor Restaurant, Inc., operated a restaurant and bar located at 77 Fulton Street, New York, New York. The business was sold on April 30, 1984.

2. On August 14, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, covering the period June 1, 1981 through Yay 31, 1984, for taxes due of \$40,098.10, plus penalty and interest of \$9,298.03, for a total of \$49,396.13. The taxes due on the notice were estimated prior to the completion of a field audit of petitioner's books and records. When the audit was completed, the actual tax found due was \$5,530.18 which was based on the transfer of furniture, fixtures and equipment in the bulk sale of the business assets. Petitioner's sales were accepted as reported on sales tax returns filed.

3. The Audit Division used the book value from schedule 4562 of the Federal income tax return filed by petitioner for the fiscal year ended June 30, 1984 as a basis for computing the tax due as follows:

<u>Account</u>	<u>Date Acquired</u>	<u>Cost or Other Basis</u>	<u>Depreciation</u>	<u>Book Value</u>
Furniture & Fixtures	7/14/80	\$100,000.00	\$38,333.00	\$ 61,667.00
Leasehold & Equipment	7/14/80	294,000.00	86,691.00	207,309.00

The applicable tax rate (8½%) was applied to the book value of the furniture and fixtures to arrive at tax due of \$5,087.53. With respect to the leasehold and equipment account, the Audit Division estimated that 5 percent represented the equipment portion of the account and computed the tax due on \$10,365.45, or \$855.15. The estimate was based on the auditor's observation of the premises

made on December 14, 1984. The purchaser paid a bulk sales tax of \$412.50

based on a value of \$5,000.00 which is less than the value of the assets sold.

4. The total purchase price of the business was \$425,000.00, which included all chattels and merchandise contained in the premises, together with all equipment used in the operation of the business, the right to use petitioner's trade name and telephone number and the lease of the business premises. The agreement of sale placed a value of \$5,000.00 on fixtures sold with the business.

5. When petitioner purchased the business in July 1989, the seller and petitioner agreed that the purchase price of the fixtures and equipment was \$5,000.00 and petitioner remitted bulk sales tax of \$400.00 computed thereon. Petitioner did not acquire any further furniture, fixtures or equipment during the period it operated the business. The Audit Division did not assess any additional tax on this prior bulk sale.

6. Petitioner's general ledger had an account entitled "lease, equipment, leasehold" which showed an entry on July 14, 1980 for \$394,000.00. Petitioner argued that its tax return reflecting a breakdown of \$100,000.00 for fixtures and equipment and \$294,000.00 for leasehold and equipment was incorrect.

7. Petitioner took the position that the sale of fixtures for \$5,000.00 in the agreement of sale was an arm's length transaction and was the proper value for the personal property transferred to the purchaser.

8. The purchaser of the business from petitioner operated the restaurant from Yay 1984 until approximately October 1985 at which time the purchaser was evicted from the premises by the landlord. The purchaser defaulted on the promissory notes provided in the agreement of sale. Petitioner concluded that since the purchaser defaulted, it did not receive payment for the furniture, fixtures and equipment and, therefore, the bulk sale was never consummated.

Petitioner offered no evidence to establish that the promissory notes were

uncollectible and thereby considered a bad debt.

CONCLUSIONS OF LAW

A. That the bulk sales tax was paid by the purchaser on the value of \$5,000.00 placed on the fixtures in the contract of sale. The sales price allocated to the personal property is subject to review as to fairness and must have a provable basis for such allocation. The Tax Commission had the right and obligation to arrive at a fair sales price of the personal property for sales tax purposes (Matter of WEBR, Inc. v. State Tax Commission, 58 AD2d 471). Under the circumstances herein, the book value determined by the Audit Division set forth in Finding of Fact "3" was the proper basis for determining the bulk sales tax (Hatter of Faliro Enterprises, Inc., State Tax Commission, June 19, 1986). Accordingly, petitioner is liable for the additional bulk sales tax of \$5,530.18 which it failed to collect from the purchaser pursuant to section 1133(a) of the Tax Law.

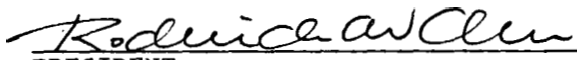
B. That the nonpayment of promissory notes by the purchaser of petitioner's business assets was not a bad debt under the provisions of 20 NYCRR 534.7.

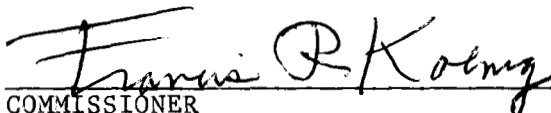
C. That the petition of Syldor Restaurant, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 14, 1984, as revised to \$5,530.18, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER