

STATE OF NEW YORK

STATE **TAX** COMMISSION

In the Matter of the Petition

of

ALBEE'S GALAXIE LTD.

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, 1980
through August 31, 1983.

DECISION

In the Matter of the Petition

of

ALBEE LEVINE,
OFFICER OF ALBEE'S GALAXIE LTD.

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, 1980
through August 31, 1983.

Petitioners, Albee's Galaxie Ltd., 1600 Round Swamp Road, Plainview, New York 11803 and Albee Levine, Officer of Albee's Galaxie Ltd., 155 West Shore Drive, Massapequa, New York 11758, each 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, 1980 through August 31, 1983 (File Nos. 56625 and 56626).

A consolidated hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 5, 1986 at 1:30 P.M. Petitioners appeared by Jeffrey A. Getzel, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether petitioner Albee's Galaxie Ltd. is liable for sales and/or use tax on its purchases of floral centerpieces and arrangements which it used in its catering business.

FINDINGS OF FACT

1. During the period under consideration, petitioner Albee's Galaxie Ltd. ("Albee's"), a New York corporation, operated a catering business at 1600 Round Swamp Road in Plainview, New York. Petitioner Albee Levine was the president of the corporation and also signed the corporation's New York State and local sales and use tax returns. Albee's maintained four rooms and a chapel at said location and provided everything from the rental of a single meeting room to the most lavishly complete catered party, including food, liquor, flowers, entertainment, valet parking, bridal attendant and printed menus.

2. On September 1, 1983, Albee's executed a consent extending the period of limitations for issuing an assessment for sales and use taxes for the period June 1, 1980 through May 31, 1981 to September 20, 1984.

3. As the result of a field audit which covered the period June 1, 1980 through August 31, 1983, the Audit Division determined that Albee's was liable for additional sales and use taxes of \$58,294.90. Albee's agreed that it owed additional sales and use taxes of \$40,372.82 and on July 10, 1984 it executed a Consent to Fixing of Tax Not Previously Determined and Assessed whereby it agreed to said amount. Accordingly, on August 20, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Albee's for the balance of the taxes due totalling \$17,922.08, plus interest of \$4,998.03, for a total amount due of \$22,920.11. The taxes at issue were computed by the Audit Division to be due on Albee's purchases of

floral centerpieces and arrangements. Also on August 20, 1984, the Audit Division issued a notice assessing petitioner Albee Levine, as an officer of Albee's, for the entire \$58,294.90, plus interest of \$16,335.46, for a total amount due of \$74,630.36.

4. Each of the petitioners herein timely filed a petition for a hearing to review the notices. Petitioners contend that the floral centerpieces and arrangements are purchased for resale in the same manner as the food and liquor and, therefore, that said purchases are exempt from tax.

5. In the conduct of its catering business, Albee's included in the price per person which it charged its customers an allowance for flowers. A minimum of six weeks before the affair, the customer ordered the flowers from Albee's supplier, Spitz & Peck, in Cedarhurst, New York. The floral centerpieces, arrangements and/or canopies chosen were specific to the catered party in question by the customer's tablecloth color, other color schemes employed by the customer and specific likes and dislikes of the customer, e.g., types of flowers. On the day of the affair, the flowers were delivered to Albee's premises and placed in the appropriate room by employees of Albee's. At the end of the affair, the flowers were taken home by either the customer or his guests. The flowers were not reused by Albee's. Spitz & Peck billed and was reimbursed by Albee's for the flowers, except that where the customer ordered additional flowers or exceeded his allowance, Spitz & Peck billed the customer directly for the difference. Spitz & Peck charged sales tax on any billing made directly to the customer. Sales tax was not charged on billings to Albee's because Albee's had furnished Spitz & Peck with a resale certificate covering all flower purchases.

6. Albee's customers also had the option of not having any flowers at an affair at Albee's premises or of dealing directly with a florist of their choice. If the customer chose not to have Albee's provide the floral arrangements, he would receive a lower price per person or a credit of a certain dollar amount per table.

7. Albee's charged sales tax on the total bill to its customers, including the allowance for flowers.

8. The Audit Division claims that when Albee's caters an affair, the floral centerpieces and arrangements are given their first use as part of its catering service and, therefore, are not purchased solely for resale.

9. Petitioner Albee Levine does not contest the fact that he is liable for the taxes determined to be due from Albee's.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax upon:

"(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in [Article 28]."

B. That section 1101(b)(4)(i) of the Tax Law defines "retail sale" as:

"(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax'.

C. That section 1105(d) of the Tax Law imposes a tax upon:

"(d)(i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers".

D. That petitioner Albee's Galaxie Ltd. purchased the floral centerpieces and arrangements for use in performing catering services which are subject to tax under section 1105(d) of the Tax Law and not for resale as such or as a physical component part of tangible personal property or for use in performing services subject to tax under section 1105(c)(1), (2), (3) or (5) of the Tax Law (see Burger King, Inc. v. State Tax Commission, 51 NY2d 614; Laux Advertising, Inc. v. Tully, 67 AD2d 1066; Matter of Albany Calcium Light Co. v. State Tax Commission, 44 NY2d 986).

E. That the petitions of Albee's Galaxie Ltd. and Albee Levine are denied and the notices of determination and demands for payment of sales and use taxes due issued August 20, 1984 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Tulle
COMMISSIONER