

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

WYE VALLEY CATERING, 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 June 1, 1979  
through May 31, 1982.

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Petitioner, WYE Valley Catering, Ltd., c/o Neil Heap, P.O. Box 812,  
Greenwood Lake, New York 10925, 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. 63334).

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 23, 1986 at 9:15 A.M. Petitioner appeared by its president, Neil Heap.  
The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of  
counsel).

#### ISSUES

I. Whether a separately stated charge for music or entertainment by a  
caterer is subject to tax.

II. Whether the Audit Division properly imposed interest on the unpaid  
sales tax liability found due on a field audit.

#### FINDINGS OF FACT

1. Petitioner, WYE Valley Catering, Ltd., operated a catering business  
which, in addition to preparing and serving food and drink, provided music for  
the catered affair.

2. On May 20, 1985, as the result of an audit, 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, 1979 through May 31, 1982 for taxes due of \$4,358.38, plus interest of \$2,291.18, for a total of \$6,649.56.

3. Mr. Neil Heap, petitioner's president, executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through February 28, 1982 to May 20, 1985.

4. On audit, the Audit Division compared sales tax collected as shown in the cash receipts journal with the sales tax paid with returns filed and found that there was an inadvertent underpayment of \$1,082.04. Nontaxable sales were analyzed for the month of July 1981 (petitioner executed an Audit Method Election whereby it agreed to the Audit Division's use of a test period audit method). The Audit division disallowed certain nontaxable sales which resulted in the following areas of deficiency:

(a) music	-	\$2,665.19
(b) barman, flowers	-	195.41
(c) extraordinary sale	-	368.36

The Audit Division also determined that petitioner failed to pay tax of \$47.38 on the purchase of printed materials. The only area of disagreement is with the tax assessed on the charge for music.

5. Petitioner entered into contracts with certain customers whereby it provided musical entertainment as part of the catering services. Petitioner charged the customer separately for the music on the invoice and did not collect sales tax on such charge. The Audit Division took the position that the charge for music is taxable when it is in connection with the sale of food and drink by a caterer.

6. Petitioner argued that interest should not be applicable to the disagreed portion of the tax due (\$2,665.19) because of the delay by the Audit Division in concluding the audit.

CONCLUSIONS OF LAW

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

"The receipts from every sale of...food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments...or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers...." (Emphasis supplied.)

B. That petitioner's charge for musical entertainment was an "other charge" to the customer in conjunction with the sale of food and drink and thus became part of the receipts subject to the tax imposed under section 1105(d)(i) of the Tax Law.


C. That section 1145(a)(1)(iii) of the Tax Law provides that the Tax Commission may remit penalty and that portion of interest that exceeds the minimum for reasonable cause. However, there is no statutory provision to remit, cancel or abate minimum interest.

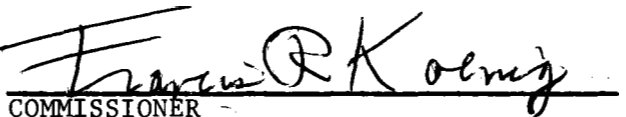
D. That the petition of WYE Valley Catering, Ltd. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1985 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 20 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER