

Sales Tax Determinations
A-2
**BUREAU OF LAW
MEMORANDUM**

*Blue Bird Tavern &
Restaurant*

TO: Commissioners Murphy, Macduff and Conlon
FROM: Vincent P. Molineaux, Hearing Officer
SUBJECT: Blue Bird Tavern & Restaurant
Formal hearing - application to review
determinations and/or a refund of sales
taxes for quarterly periods ending
November 30, 1965, February 28, 1966 and
May 31, 1966

A hearing on the above matter was held before me in Albany, New York on December 7, 1966.

The issue is whether the receipts of a tavern and restaurant from sales of beer at 15 cents a glass in an area of the State where the applicable sales tax rate is only 2% are subject to the sales tax even though the 2% bracket schedule prescribed by the State Tax Commission under section 1132 of the Tax Law does not require the collection of any tax from the customer on a sale under 26 cents. In other words, even though the owners of the tavern and restaurant involved here were not required by the bracket schedule to collect the tax from the customers on their 15-cent sales of beer, were they still required to remit sales taxes to the Commission on such receipts.

The taxpayers contend that their only duty is to collect the sales tax from the customer, as trustee for and on account of the State, pursuant to section 1132(a) of the Tax Law, under a schedule for collection of the tax promulgated pursuant to section 1132(b) of the Tax Law, and that since such collection schedule does not require the taxpayers to collect a tax from the customers on sales under 26 cents, the taxpayers are not liable to pay a tax on receipts from sales under 26 cents.

A tax is imposed by section 1105(d) of the Tax Law on receipts from the sale of beer by a tavern or restaurant, irrespective of price.

Sections 1133(a) and 1137 of the Tax Law make vendors liable for the tax imposed and require them to pay such tax with their returns. Thus, the liability of the vendor is not merely for the tax collected or required to be collected, but also for the tax imposed. Such sections so provide as follows:

Section 1133(a) states that every vendor of tangible personal property or services "shall be personally liable for

the tax imposed, collected or required to be collected under this article [Article 28 of the Tax Law]". (Emphasis supplied)

Section 1137 of the Tax Law provides that "Every person required to file a return . . . shall, at the time of filing such return, pay to the tax commission the taxes imposed by this article [Article 28 of the Tax Law] as well as all other moneys collected by such person acting or purporting to act under the provisions of this article." (Emphasis supplied)

Under the proposed determination forwarded herewith, the taxpayers would be required to pay sales tax on their sales of beer at 15 cents a glass even though no tax was collected from the customer.

A similar issue was decided by the Tax Commission on April 3, 1967 in a formal determination entitled Matter of Bethlehem Auto Laundry, Inc. That matter concerned the liability of a vendor in a 2% tax area to pay sales tax on sales of car washing and waxing services sold through coin-operated machines where the price is 25 cents. The matter also concerned sales of towels and other items through coin-operated machines for 10 cents. The Commission upheld the assessment in that matter. A copy of the determination and the hearing officer's memorandum, dated March 8, 1967, to the Tax Commission in that matter are attached. The proposed determination in the Blue Bird Tavern & Restaurant matter is in accord with the conclusion reached in the determination by the Tax Commission in Matter of Bethlehem Auto Laundry, Inc.

In Matter of Bethlehem Auto Laundry, the taxpayer relied on the last sentence of section 1132(b) of the Tax Law. That sentence provides as follows:

"Such schedule or schedules shall provide that no tax shall be collected from the customer upon receipts from retail sales of tangible personal property which, under the rate imposed by article twenty-eight, together with the rates imposed under the authority of article twenty-nine, produce a tax of five mills or less."

The taxpayers in the Blue Bird Tavern & Restaurant formal hearing have not specifically relied on this section. In any event, it is doubtful whether that provision is applicable to the receipts at issue here, that is, receipts subject to tax under section 1105(d) of the Tax Law, since the provision in section 1132(b) set forth above by its terms is restricted to "receipts from retail sales of tangible personal property", and the tax on such sales is imposed under section 1105(a) of the Tax Law.

The proposed determination also agrees with decided cases, including New York Automatic Canteen v. Joseph, 8 A D 2d 385, aff'd 8 N Y 2d 853, and the cases cited therein. These cases involve a similar issue to that in the Blue Bird Tavern matter with respect to the New York City sales taxes in effect prior to the enactment of Articles 28 and 29 of the Tax Law and include interpretations of pertinent sections of the Administrative Code of the City of New York and the regulations promulgated thereunder concerning bracket schedules and the liability of a vendor for payment of the tax. It is to be noted, however, that the liability of a vendor to pay City sales tax not collected by him was affirmed by the Court of Appeals in the Automatic Canteen case, *supra*, under section 241-2.0 c of the Administrative Code of the City of New York, the language of which is not as precise as the language in sections 1133(a) and 1137 of the Tax Law. The language in sections 1133(a) and 1137 of the Tax Law clearly provides that a vendor is liable for and is required to pay the taxes imposed by the Sales and Use Tax Law.

The proposed determination also follows a Law Bureau opinion, dated October 5, 1965, rendered to Prentice-Hall, a copy of which is attached.

For the above reasons, I am of the opinion that the taxpayers are liable for the tax on sales of beer at 15 cents despite the fact that no tax has been collected by them on such sales. I have accordingly prepared a proposed determination sustaining the assessments and denying the claimed refund. If you agree, kindly sign one original and three copies of the proposed determination and return the same together with attached file to the Law Bureau for further processing.

/s/

VINCENT P. MOLINEAUX
Hearing Officer

VPM:er
Encs.

August 14, 1967

8-17-67

STATE OF NEW YORK
STATE TAX COMMISSION

: IN THE MATTER OF THE APPLICATION :
: OF :
: Philip H. Komp and Robert C. Schuhl d/b/a :
: BLUE BIRD TAVERN & RESTAURANT :
: TO REVIEW DETERMINATIONS OF SALES TAX UNDER :
: ARTICLE 28 OF THE TAX LAW FOR THE QUARTERS :
: ENDING NOVEMBER 30, 1965 AND FEBRUARY 28, :
: 1966 AND FOR REFUND OF SALES TAX PAID FOR :
: THE QUARTER ENDING MAY 31, 1966 :
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Philip H. Komp and Robert C. Schuhl, doing business as Blue Bird Tavern & Restaurant, having filed an application to review the determinations of sales tax pursuant to Article 28 of the Tax Law, and a hearing having been held at the office of the State Tax Commission, State Campus, Albany, New York on December 7, 1966 before Vincent P. Molineaux, Hearing Officer of the Department of Taxation and Finance, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers, Philip H. Komp and Robert C. Schuhl, doing business as Blue Bird Tavern & Restaurant, are engaged in the operation of a tavern and restaurant where both food and beverages are sold to the public, including beer at 15 cents a glass.

(2) That the taxpayers filed New York sales and use tax returns for the quarters ending November 30, 1965, February 28, 1966 and May 31, 1966 and reported on such returns a total New York State tax computed at the rate of 2% of the taxable sales and services. Such total taxes were reported in the

amounts of \$323.22, \$321.89 and \$347.64 for each of the above quarters respectively; that the taxpayers, however, only paid with such returns the amounts of \$169.22, \$169.26 and \$187.26 for each of the above quarters respectively, contending that the unpaid balances of \$154.00, \$152.63 and \$160.38 represented credits taken by them on the returns for taxes at the rate of 2% on the taxpayers' estimated receipts from sales of beer at prices less than 26 cents.

(3) That taxpayers computed the claimed credit for each quarter by first multiplying the number of kegs of beer dispensed by the estimated number of glasses of beer priced at 15 cents in each keg to arrive at the total estimated number of such glasses of beer sold; that taxpayers then multiplied the estimated number of such glasses of beer sold by 15 cents, the selling price for each glass of beer, to arrive at the total estimated receipts from sales of all such glasses of beer; that taxpayers then multiplied such total estimated receipts by the applicable sales tax rate of 2%, subtracting such product from the total taxes reported on their quarterly sales and use tax returns.

(4) That the State Tax Commission issued notices of determinations #90706823 and #90706824 assessing the New York State 2% sales tax against Blue Bird Tavern & Restaurant in the amount of \$162.33 for the quarter ended November 30, 1965 and \$158.60 for the quarter ended February 28, 1966, disallowing the credits taken for such quarters; that a hearing was held as aforesaid to review the determinations of tax for the above quarters; that subsequent to the date of the hearing, the State Tax Commission demanded payment of the amount of \$160.38 taken as a credit for the quarter ended May 31, 1966 (Notice

No. 90823244); that payment of this claim, together with interest in the amount of \$2.43, was made by the taxpayers for such quarter; that a refund of such payment has been requested by the taxpayers; that such request, the taxpayers consenting thereto, is hereby deemed an application for a refund for such quarter and is hereby considered in this determination.

(5) That taxpayers' tavern and restaurant is located at 205 Mohawk Avenue, Scotia, New York, an area of the State where the applicable sales tax rate is 2%, and that no tax has been collected by taxpayers from their customers on receipts from sales of less than 26 cents.

(6) That the taxpayers contend that their only duty is to collect the sales tax from the customer, as trustee for and on account of the State, pursuant to section 1132(a) of the Tax Law, under a schedule for collection of the tax promulgated pursuant to section 1132(b) of the Tax Law, and that since such collection schedule does not require the taxpayers to collect a tax from the customer on sales under 26 cents, the taxpayers are not liable to pay a tax on receipts from sales under 26 cents.

(7) That pursuant to section 1132(b) of the Tax Law, the Tax Commission promulgated a regulation establishing the following schedule for collection of the tax from purchasers with respect to any receipt, amusement charge or hotel room rent subject only to the 2% sales or use tax imposed by New York State.

"Section 525.1 Sales and use tax bracket schedule for State and local tax purposes. (a) The following amounts of tax shall be collected from purchasers with respect to any receipt, amusement charge, or hotel room rent subject to tax under article 28 or pursuant to articles 28 and 29 of the Tax Law.

"(1) The following schedule is applicable where a tax of two per cent is imposed:

Two per cent New York State tax only

On purchases of less than one dollar:

Amount of sale	Tax to be collected
\$0.01 to \$0.25	None
.26 to .65	1¢
.66 to .99	2¢

"On purchases of one dollar or more, the tax is two cents on each whole dollar of purchase plus the rate shown above on the amounts less than a dollar." (20 NYCRR 525.1(a)(1))

(8) That section 1105(d) of the Tax Law, in part, imposes a tax on receipts from every sale of beer, wine or other alcoholic beverages, irrespective of price, sold in or by restaurants, taverns or other establishments or by caterers, and that section 1105(d) further provides that the receipts subject to tax under that section include any cover, minimum, entertainment or other charge made to a customer.

(9) That taxpayers' receipts from the sale of beer in their tavern and restaurant were subject to sales tax under section 1105(d) at the 2% rate imposed by New York State.

(10) That section 1133(a) of the Tax Law provides that every vendor of tangible personal property or services "shall be personally liable for the tax imposed, collected or required to be collected under this article [Article 28 of the Tax Law]".
(Emphasis supplied)

(11) That section 1137 of the Tax Law provides that "Every person required to file a return * * * shall, at the time of filing such return, pay to the tax commission the taxes imposed by this article [Article 28 of the Tax Law] as well as all other moneys collected by such person acting or purporting to act under the provisions of this article." (Emphasis supplied)

Based on the foregoing and all of the evidence presented herein, the State Tax Commission hereby

DETERMINES:

(A) That taxpayers, as vendors of beer in a tavern and restaurant, are subject to the tax imposed by section 1103(d) of the Tax Law on all of their receipts from such sales of beer, irrespective of price, whether or not the tax was collected from the customer;

(B) That the notices of determination #90706823 and #90706824 assessing sales tax against Blue Bird Tavern & Restaurant for the quarters ending November 30, 1965 and February 28, 1966 are correct; and that taxpayers' application for redetermination of such assessments is hereby denied.

(C) That taxpayers' application for refund of \$162.81 paid for the quarter ended May 31, 1966 is also hereby denied.

Dated: Albany, New York on the 22nd day of September, 1967.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ JAMES R. MACDUFF
Commissioner

/s/ WALTER MACLYN CONLON
Commissioner