

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

April 10, 1981

B-T Productions, Inc. d/b/a Town & Country Dinner Theatre
and Anthony P. Della Pietra
445 West Commercial St.
East Rochester, NY 11445

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1240 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jack M. Battaglia
Suite 1111 First Federal Plaza
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

April 10, 1981

B-T Productions, Inc. d/b/a Town & Country Dinner Theatre
and Anthony P. Della Pietra
902 South Washington St.
East Rochester, NY 14445

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STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
B-T Productions, Inc. d/b/a Town & Country Dinner Theatre :
and Anthony P. Della Pietra :
: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Periods 12/74-2/76 & 3/76-10/76. :

State of New York
County of Albany

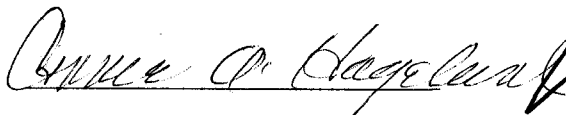
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of April, 1981, he served the within notice of Decision by mail upon B-T Productions, Inc. d/b/a Town & Country Dinner Theatre, and Anthony P. Della Pietra, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

B-T Productions, Inc. d/b/a Town & Country Dinner Theatre
and Anthony P. Della Pietra
445 West Commercial St.
East Rochester, NY 11445

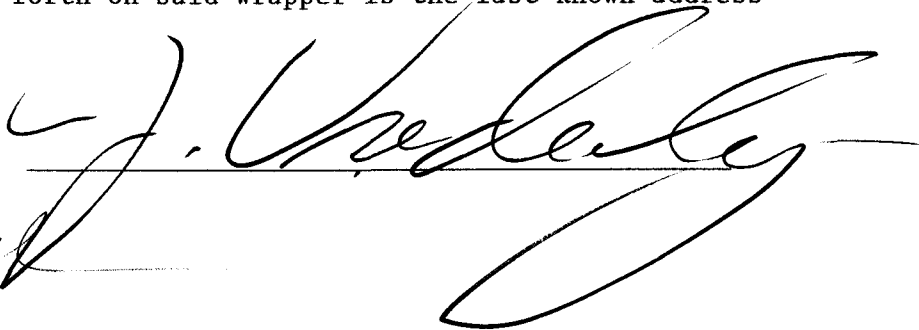
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
10th day of April, 1981.



Anne P. Hagel



Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
B-T Productions, Inc. d/b/a Town & Country Dinner Theatre
and Anthony P. Della Pietra : AFFIDAVIT OF MAILING

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Mr. Jack M. Battaglia
Suite 1111 First Federal Plaza
Rochester, NY 14614

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Sworn to before me this
10th day of April, 1981.

James A. Fogelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
B-T Productions, Inc. d/b/a Town & Country Dinner Theatre :
and Anthony P. Della Pietra :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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B-T Productions, Inc. d/b/a Town & Country Dinner Theatre
and Anthony P. Della Pietra
902 South Washington St.
East Rochester, NY 14445

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10th day of April, 1981.

Annmarie A. Hayland

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
B-T Productions, Inc. d/b/a Town & Country Dinner Theatre
and Anthony P. Della Pietra :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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Sworn to before me this
10th day of April, 1981.

Cornie A. Hazelund

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
B-T PRODUCTIONS, INC. d/b/a	:	
TOWN & COUNTRY DINNER THEATRE and	:	DETERMINATION
ANTHONY P. DELLA PIETRA	:	
	:	
for Revision of a Determination or for	:	
Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for	:	
the Periods December 1, 1974 through	:	
February 29, 1976 and March 1, 1976	:	
through October 31, 1976.	:	

Applicants, B-T Productions, Inc. d/b/a Town & Country Dinner Theatre, 445 West Commercial Street, East Rochester, New York 14445, and Anthony P. Della Pietra, 902 South Washington Street, East Rochester, New York 14445, filed an application for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 1974 through February 29, 1976 and March 1, 1976 through October 31, 1976 (File Nos. 16352, 17857 and 17858).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on May 2, 1978 at 10:00 A.M. Petitioner appeared by Jack M. Battaglia, Esq. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether charges for tickets to performances at a dinner theater (which charges did not include the cost of food or beverages) were subject to sales tax as admission charges to a place of amusement, taxable under section 1105(f)(1)

of the Tax Law, or as amounts paid as charges of a roof garden, cabaret or other similar place, taxable under section 1105(f)(3) of the Tax Law.

FINDINGS OF FACT

1. On May 28, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant Town & Country Dinner Theatre for \$75,310.75, plus penalty and interest of \$14,303.98, for a total of \$89,615.16. This was for the period December 1, 1974 to February 29, 1976. The Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Anthony Della Pietra for the same period, as officer of Town & Country Dinner Theatre, in the amount of \$72,122.21, plus penalty and interest of \$13,602.96, for a total of \$85,725.17.

2. On November 26, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against B-T Productions, Inc. d/b/a Town & Country Dinner Theatre in the amount of \$72,800.00, plus penalty and interest of \$7,764.00, for a total of \$80,564.00 for the period March 1, 1976 to October 31, 1976. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was also issued against Anthony Della Pietra, as officer of Town & Country Dinner Theatre, for the same period and for a total of \$80,564.00.

3. The aforesaid notices of determination consisted of sales tax which the Audit Division computed as due on admission charges to the Town and Country Dinner Theater. Further, the Notice of Determination issued May 28, 1976 against applicant Town and Country Dinner Theater included use tax computed upon expense and capital purchases. Said use tax in the amount of \$3,188.54 is not at issue.

4. Applicant Town & Country Dinner Theatre was the expansion of a summer theater operation to a year-round theater in East Rochester, New York. The theater consisted of a lobby, theater, kitchen, dressing rooms, offices, a box office and other rooms in a single-floor building. Patrons entered through a lobby which contained a bar, a box office and rest rooms. The lobby was separated from the theater by a solid wall. The bar was on the lobby side of the wall. On each side of the bar, there were doors that opened into the theater. Access to the bar and lobby from the theater was through doors located on each side of the bar. These doors were always closed during performances.

The theater was a separate room measuring 100 feet by 100 feet and was isolated from other parts of the facility. Tiered steps rose from the permanent stage to the back of the theater. There was permanent stage lighting, along with a sound and light room. Six dressing rooms were located to the left of the theater.

The theater sat approximately 800 people at tables which were located on the tiered steps. Behind the permanent stage was an area where "sets" which were used as decorative background for performances were manufactured and stored.

During 1975 and 1976, the theater had one performance during each weekday evening at 8:30 P.M. There were two performances on Friday and Saturday, one at 8:30 P.M. and the second at 11:30 P.M. The first show was "the dinner show" at which dinner was served between 6:30 P.M. and 8:00 P.M. The 11:30 P.M. performance on Friday and Saturday was referred to as "the cocktail show". On weeknights the theater opened at 6:00 P.M. and closed at approximately 11:00 P.M. On weekends the theater opened at 6:30 P.M. and closed after the 11:30 P.M. show, between 1:30 A.M. and 2:00 A.M. The theater was not open on evenings when there was no entertainment booked.

During 1975 and 1976, the performances consisted of shows by popular singers and dancers such as Shirley MacLaine, Carol Channing, Cyd Charisse, Vic Damone, and comedians Milton Berle and Jerry Lewis. There were also musical groups such as the "Four Freshmen" and the "Kingston Trio".

During 1975 and 1976, there were Broadway-type plays or musicals such as Finian Follies (a choreographed musical), Cabaret and 1776, and also musical plays.

Each performance had a backup orchestra consisting of from 12 to 32 musicians, who played various instruments.

Entertainment at the Town & Country Dinner Theatre during 1975 and 1976 was of a high quality which was not generally afforded at any other establishments in the Rochester area, except for large theaters such as the War Memorial, Dome Arena, Auditorium Theater and the Eastman Theater.

Food and beverages which were served in the theater were served prior to the performances and never during the performances. At the dinner show, a patron could not order any food after 8:00 P.M. No food or drinks were served in the dinner theater after any show.

Patrons were admitted to the theater by tickets only. Tickets were sold through the box office either in advance or on the night of the performance. The patron would hand his ticket to an usher who would show the patron to a pre-assigned seat. Seats were pre-assigned, based on the date of payment of the ticket. The best seats went to the patrons who paid for their tickets the earliest. The ticket did not permit the patron to stay for both the dinner and the cocktail show. Patrons were only entitled to stay for the show for which their tickets were purchased, and could not stay for the subsequent show. After the dinner show on weekends, the patrons were asked to leave the theater in order to prepare for the next show.

The box office was open for the sale of tickets between 9:00 A.M. and 11:00 P.M. daily, including Monday, even though the theater was closed on that day. Tickets could be ordered in person, by mail or over the telephone. Sometimes, tickets were ordered as much as six months in advance.

The price of the ticket for the weeknight performances and the late shows on Friday and Saturday evenings was \$6.00. This was the price for admission to see the entertainment, and did not include the cost of any food or drinks. The basic charge for admission to the dinner shows on Friday and Saturday was \$8.00, and did not include the cost of dinner. The price of the dinner was \$5.40, plus tax, for a total of \$5.95, and was in addition to the cost of admission to the dinner show. The price of the dinner never varied, although the price for admission to the entertainment varied due to the cost of providing the entertainment. For example, the charge for admission to the Jerry Lewis show was \$10.00; admission to the Bobby Vinton show was \$12.00. These prices were for admission to the show only. The charge for dinner was in addition to this amount and remained at \$5.95, including tax.

The \$6.00 price for the ticket to the cocktail show did not include the cost of any drinks, nor were drinks included as part of the purchase price for the ticket. The cost of drinks was over and above the price of the ticket.

Patrons could and did attend the dinner show without having dinner by paying the basic price of admission for the entertainment. The dinner charge was eliminated from the price of the ticket.

Patrons could purchase a "show only" ticket for the dinner show and were under no obligation to buy drinks or purchase any food.

There was no breakdown on the ticket between the price for admission and the price for dinner. There was a sign over the box office which did show said breakdown.

Patrons for the dinner show ordered from a menu. The same menu was used for each dinner show during 1975 and 1976. The purpose of the menu was to give the patrons a limited choice of items for quick service prior to the show. The items on the menu were prepared ahead of time. The limited menu prevented patrons from eating during the performance. The food or menu did not attract customers to the theater and without the show, the theater could not have continued in existence from the sale of food and liquor alone.

The price of the food and drinks served at the dinner theater was comparable to that charged by other local restaurants for food and drinks.

The Town & Country Dinner Theatre advertised its performances in local newspapers. The advertisements only referred to the performers, the performances and the price of the show, and did not refer to or mention food or beverages.

Patrons to the theater received a program which gave them a brief description of the entertainer and the performance, and the schedule of future performances.

No dancing was allowed during or after any of the performances. The backup orchestra for the performance was composed of union musicians belonging to the American Federation of Musicians, Rochester Local Chapter. The musicians were paid union rates which were established by the union and were set forth in a booklet. The rate paid by Town & Country Dinner Theatre was under the category of "Shows" in section 16 of the booklet and was \$32.00 per show. The rate for hotels, motels, restaurants and lounges or nightclubs was set forth in section 31 of the booklet and was \$31.00 per night.

Many patrons attended the dinner show to see only the show, and did not have a meal. No patrons ever came solely to have dinner without watching the show.

5. Applicants at all times acted in good faith.

CONCLUSIONS OF LAW

A. That section 1105(f)(1) of the Tax Law imposes sales tax on the following:

Any admission charge ... to or for the use of any place of amusement in the state, except charges for admission to ... dramatic or musical arts performances ...

Section 1101(d)(5) of the Tax Law defines "dramatic or musical arts admission charge" as:

Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance.

That the charges at issue were charges "for a live dramatic, choreographic or musical performance" within the meaning of section 1101(d)(5) of the Tax Law.

B. That section 1105(f)(3) of the Tax Law provides for the imposition of sales tax on "[T]he amount paid as charges of a roof garden, cabaret or other similar place in the state." Section 1101(d)(12) of the Tax Law defines "roof garden, cabaret or other similar place" as "any roof garden, cabaret or other similar place which furnishes a public performance for profit."

That the term "charge of a roof garden, cabaret or other similar place" is defined by section 1101(d)(4) of the Tax Law as "any charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place."

That the charges at issue are not charges of "a roof garden, cabaret or other similar place" under section 1105(f)(3) of the Tax Law.

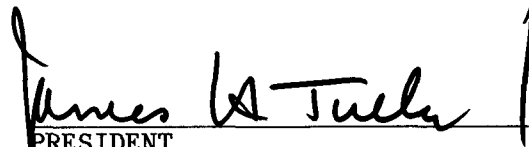
C. That the application of B-T Productions, Inc. d/b/a Town & Country Dinner Theatre and Anthony P. Della Pietra is granted. That the Audit Division is directed to modify the Notice of Determination issued May 28, 1976 against

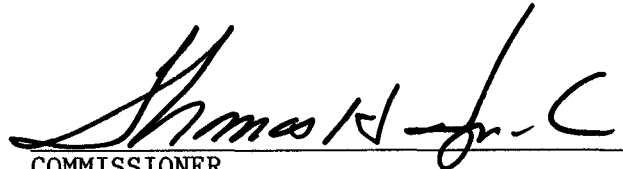
Town & Country Dinner Theater to reflect tax due of \$3,188.54 plus interest computed at the minimum statutory rate. That the notices of determination issued May 28, 1976 and November 26, 1976 against Anthony P. Della Pietra and issued November 26, 1976 against B-T Productions, Inc. d/b/a Town & Country Dinner Theater are cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

APR 10 1981


PRESIDENT


COMMISSIONER


COMMISSIONER