

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
KENNETH E. STEPHENS : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 819542
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period December 1, 1998 through August 31, 2001. :

Petitioner, Kenneth E. Stephens, 50 Hillwood Drive, Huntington Station, New York, 11746, 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 December 1, 1998 through August 31, 2001.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 21, 2004 at 10:30 A.M. with all briefs to be submitted by September 10, 2004, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Certilman Balin Adler & Hyman, LLP (James Rose, Esq., and Steven Sulsky, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel).

ISSUES

I. Whether the audit methodology employed by the Division of Taxation was reasonably calculated to reflect the sales and use taxes due.

II. Whether petitioner had sufficient involvement in and control over the activities of Three Jesters Restaurant Corporation d/b/a Tupelo Honey so as to be considered a person

responsible for collecting and remitting sales tax on behalf of said corporation pursuant to Tax Law §§ 1131(1) and 1133(a).

III. Whether penalties should be canceled.

FINDINGS OF FACT

1. Prior to the period in issue, petitioner, Kenneth E. Stephens, and Paavo Raudkivi each owned 50 percent of the stock of Kiviken, Inc. d/b/a Mill River Inn. The Mill River Inn was a restaurant which employed Michael Meehan as the chef.

2. Petitioner and Mr. Raudkivi decided that they needed to expand their restaurant and that, rather than enlarge the existing restaurant, they would open a new restaurant which would be operated by Mr. Raudkivi. It was anticipated that petitioner would continue to run the Mill River Inn. In 1993, petitioner, Paavo Raudkivi and Michael Meehan formed the Three Jesters Restaurant Corporation (“Three Jesters”) for the purpose of constructing and operating a restaurant in Sea Cliff, New York known as Tupelo Honey. Petitioner, Paavo Raudkivi and Michael Meehan each owned one-third of the stock of Three Jesters.

3. The initial budget for the construction of Tupelo Honey was \$350,000.00. However, the cost of the restaurant escalated and ultimately cost almost \$800,000.00. Petitioner objected to the expenditure of the additional sums of money because the money had to be borrowed. Paavo Raudkivi, however, thought that it was necessary to spend the money. The difference in opinion over how much to spend on the project caused the relationship between petitioner and Mr. Raudkivi to become very strained. The third shareholder, Michael Meehan, did not become involved in these discussions and continued to work at the Mill River Inn.

4. Mr. Raudkivi supervised the construction of Tupelo Honey which lasted 18 months. Mr. Raudkivi hired the architect, the designer and about 90 percent of the contractors. Petitioner

