

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
99 Maiden Lane Restaurant, Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 12/1/73-5/4/76. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of August, 1984, he served the within notice of Decision by certified mail upon 99 Maiden Lane Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

99 Maiden Lane Restaurant, Inc.
c/o Marvin Selk
141-30 86th Dr.
Flushing, NY 11367

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
9th day of August, 1984.

David Parchuck

James R. Hays
Authorized to administer oaths
pursuant to Tax Law section 174

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

August 9, 1984

99 Maiden Lane Restaurant, Inc.
c/o Marvin Selk
141-30 86th Dr.
Flushing, NY 11367

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 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Marvin Selk
141-30 68th Drive
Flushing, NY 11367
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
99 MAIDEN LANE RESTAURANT, INC. : 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 December 1, 1973 :
through May 4, 1976. :

Petitioner, 99 Maiden Lane Restaurant, Inc., c/o Marvin Selk, 141-30 68th Drive, Flushing, New York 11367, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 & 29 of the Tax Law for the period December 1, 1973 through May 4, 1976 (File No. 35803).

A formal hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 19, 1983 at 9:15 A.M., with additional evidence to be submitted by November 18, 1983. Petitioner appeared by Marvin Selk, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether the failure by the Audit Division to produce evidence that a bulk sale questionnaire or other notice was mailed to petitioner negates the estimated sales tax liability determined due for failure to submit information requested.

II. If properly estimated, whether the additional sales tax determined is actually due and owing.

FINDINGS OF FACT

1. Petitioner operated a restaurant and luncheonette under the trade name of Bambi Coffee Shop at 177 Madison Avenue, New York City up until May 4, 1976,

at which time the business was sold. The purchaser, Sklav-Lag Foods, Inc., notified the Tax Commission of the purchase on May 24, 1976 and paid the bulk sales tax of \$160.00 on furniture, fixtures and equipment purchased for \$2,000.00. The total purchase price of the business was \$132,500.00.

2. On December 10, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against 99 Maiden Lane Restaurant, Inc. (seller) covering the period February 2, 1974 through May 4, 1976. The Notice asserted additional sales tax due of \$20,436.20 plus penalty and interest of \$7,049.03 for a total of \$27,485.23.

3. The aforesaid Notice contained the following legend in explanation of the taxes asserted due:

"Failure to submit the information requested results in a determination of the following tax due in accordance with the provisions of section 1138 of the Sales Tax Law."

The Audit Division, by a desk audit, calculated that petitioner's taxable sales for each quarter should have been \$45,000.00 based on industry standards for this type of operation and determined that taxable sales were \$409,177.00 for the audit period. The taxable sales reported by petitioner were deducted therefrom and additional taxable sales were determined with tax due thereon of \$19,796.20.

The Audit Division also determined additional sales tax due of \$640.00 on the sale of the furniture and fixtures. No basis, however, for this additional assessment was given.

4. The Audit Division did not notify the purchaser and escrow agent of a possible existing claim for sales tax under the provisions of Tax Law §1141(c) until September 24, 1976. No evidence is contained in the hearing record or the Audit Division file that a notice of a possible claim or request for

information was sent to petitioner. The copy of a Notice to the Seller introduced in evidence at the hearing bore no name, address, date or other identifying information other than pen notations indicating requirements to be complied with.

5. Petitioner contended that it never received any request for information or notice of an audit and that the books and records were thrown out by the purchaser subsequent to the sale of the business. Petitioner argued that had a request for information been made shortly after the sale, the records would have been available for audit.

6. In support of its petition, to show that the sales determined by the Audit Division were incorrect, petitioner submitted statements from its various suppliers showing the amount of weekly purchases made during the audit period. Purchases of coffee and syrup used for soda were estimated by petitioner's accountant at approximately \$100.00 per week. Total weekly purchases were approximated at \$639.00.

Petitioner's gross profit margin ranged from 60 to 70 percent. Based on the purchase figures submitted, sales during the audit period would have been \$248,960.79 using a 70 percent gross profit margin.

7. Petitioner also submitted monthly bank statements¹ from Manufacturers Hanover Trust Company covering the period January, 1975 through May, 1976. All receipts were deposited except for the net weekly payroll which ranged from \$800.00 to \$1,000.00. Based on the average monthly deposits for the period January, 1975 through April, 1976 and payroll of \$1,000.00 per week, sales for the audit period can reasonably be determined to have been \$266,592.15.

¹ Petitioner contended that a portion of the bank deposits were personal loans made to the business; however, no evidence was offered to support this contention.

8. Petitioner did not offer the contract of sale or other evidence to show the selling price of the furniture, fixtures and equipment.

9. Petitioner did not explain why it failed to remit the proper amount of sales tax due. Several of petitioner's sales and use tax returns were filed without any remittance thereon. Others were filed beyond the dates due.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law establishes certain notice requirements that must be met by purchasers of business assets and by the Department. That section also provides for relief of the purchaser when the Department fails to give proper notice. No provision exists in Tax Law §1141(c) for relief of tax liability on the part of the seller for the Department's failure to give notice of a possible existing claim.

The only provisions within the Tax Law which apply to the determination of tax liability on the part of the seller are those set forth in Tax Law §§1138 and 1147. The failure by the Audit Division to produce evidence of the mailing of a notice of possible claim or a questionnaire does not in and of itself relieve petitioner from any tax liability.

B. That section 1135 of the Tax Law provides that every person required to collect tax shall keep records of every sale. Such records shall be available for inspection and examination at any time upon demand and shall be preserved for a period of three years.

C. That section 1138(a) of the Tax Law provides that when a return filed is incorrect or insufficient, the tax due may be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices. The Audit Division's duty is to choose a method "reasonably

calculated to reflect the taxes due." (Meyer v. State Tax Commission, 61 A.D.2d 223; Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206.)

The Audit Division, through a desk audit of petitioner's sales and use tax returns filed, deemed them to be insufficient when compared to industry standards for this type of business. The determination of sales based on industry standards cannot be said to be an unreasonable calculation.

D. That once it is established that the Audit Division's independent determination was permissible, the burden of proof is upon petitioner to show that the determination should be overturned. (People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346.)

Petitioner did not have records available as required by Tax Law §1135. Petitioner, however, submitted evidence of its purchases within the audit period and also submitted evidence of its bank deposits made within a portion of the audit period. The evidence presented is sufficient to show that petitioner's taxable sales for the audit period should be reduced to \$266,592.15 (see Finding of Fact "7").

E. That the petition of 99 Maiden Lane Restaurant, Inc. is granted to the extent indicated in Conclusion of Law "D" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 10, 1976 with applicable penalty and interest thereon; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 09 1984

STATE TAX COMMISSION

Roderick A. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER