

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

John and Jennie Rosa, d/b/a :
John's Pizza :

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

For a Redetermination of a Deficiency or
a Refund of Sales & Use :
Taxes under Article(s) 28 & 29 of the :
Tax Law for the ~~(Year(s))~~ :
periods Aug. 1, 1965 -
June 30, 1967

State of New York
County of Albany

Martha Funaro , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 30th day of April , 1971, she served the within
Notice of Decision (or Determination) by (certified) mail upon Albert Benson

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid

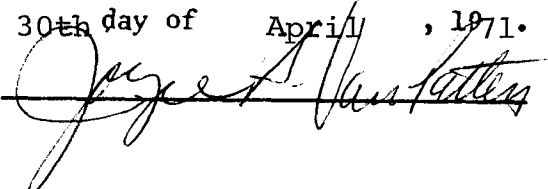
wrapper addressed as follows: Albert Benson
88-30 Sutphin Blvd.
Jamaica, New York 11435

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 Post Office Department within the State of New York.

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

Sworn to before me this

30th day of April , 1971.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

John And Jennie Rosa, d/b/a
John's Pizza

For a Redetermination of a Deficiency or
a Refund of Sales & Use
Taxes under Article(s) 28 & 29 of the
Tax Law for the ~~(Year(s))~~
periods Aug. 1, 1965 through
June 30, 1967

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State of New York
County of Albany

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age, and that on the 30th day of April , 19 71, she served the within
Notice of Decision (or Determination) by (certified) mail upon John and Jennie
Rosa, d/b/a John's (representative of) the petitioner in the within
Pizza
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: John and Jennie Rosa
d/b/a John's Pizza
8821 26th Avenue
Brooklyn, New York
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 Post Office Department within the State of New York.

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

Sworn to before me this

30th day of April , 1971.

Joseph S. Van Patten

Martha Funaro

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application :

of :

JOHN AND JENNIE ROSA :
d/b/a JOHN'S PIZZA :

DETERMINATION

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 August 1, 1965 through :
June 30, 1967. :

The applicants, John and Jennie Rosa have filed a petition for revision of a determination or for refund of sales and use taxes for the periods August 1, 1965 through June 30, 1967. A formal hearing has been held before Lawrence A. Newman, Esq., Hearing Officer, in the offices of the State Tax Commission in the City of New York on October 2, 1969. The applicants appeared through their representative, Albert Benson, C.P.A., and the Sales Tax Bureau was represented by Edward H. Best, Esq. Counsel, (Solomon Sies, Esq., of Counsel).

ISSUE

Whether sales of pizzas for off-premises consumption costing one dollar or more are subject to the sales tax.

FINDINGS OF FACT

1. The applicants, John and Jennie Rosa, have filed sales and use tax returns under the trade name, "John's Pizza," and paid the amount shown to be due upon each tax return as follows:

- a. Quarterly returns for the periods
August 1, 1965 through August 31, 1966.
- b. Annual return for the period June 1, 1966
through May 31, 1967, and
- c. Final return for the period June 1 through
June 30, 1967.

2. On January 3, 1968, the Sales Tax Bureau issued a notice of determination and demand, numbered 90, 130, 274, against the applicants covering the period August 1, 1965, through June 30, 1967.

The notice details additional sales taxes due in the amount of \$452.71, plus statutory interest.

The additional sales taxes were based upon an audit of the vendor's records by the Sales Tax Bureau. The audit resulted in the inclusion of a category of sales of whole pizzas eaten off the premises which the vendor had excluded from taxable sales as exempt. The combined Statewide and local sales tax rate was then applied to this increase in taxable sales to determine the amount of additional sales taxes due.

3. In response to the determination issued, the applicants, on January 8, 1968, made a written request for a hearing. This request was accepted by the Sales Tax Bureau as the equivalent of an application for revision of the determination.

4. Section 1105(d)(3) of the Tax Law imposes the sales and use tax in those instances where the sale is for consumption off the premises of the vendor, and consists of a meal, or food prepared and ready to be eaten, of a kind obtainable in restaurants as the main course of a meal, including a sandwich. Food other than sandwiches which is sold in an unheated state of a type commonly sold in the same form and condition in food stores other than those principally engaged in selling prepared foods, is excepted from this category.

The tax applies only when the charge to the patron is one dollar or more for a sale of food and drink of any nature, or of food alone.

5. A pizza is an open circular pie made typically of thinly rolled bread dough spread with a spiced cheese and tomato mixture and baked. Pizzas are generally prepared to order, by this vendor, in sizes up to twenty-four inches in diameter, and eaten hot. On request, this vendor will package a whole pizza in a carton as a unit to be eaten off the premises. The charge for each packaged pizza is more than one dollar.

6. Pizzas have been eaten as a snack, as an appetizer to a larger meal, and as the main course of a meal. Some persons can and do individually consume large, whole pizzas. The vendor does not determine at the time of sale the purpose for which the pizza has been purchased, or the nature of its consumption.

7. When a pizza is sold for off-premises consumption, the vendor has no knowledge of the number of persons who will consume the pizza. Therefore, the amount applicable to each person cannot be ascertained by the vendor from any evidence at the time of the sale.

DETERMINATION

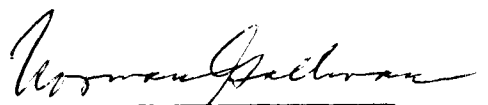
A. A whole pizza sold for consumption off the premises of this vendor is sold as a meal or the main course of a meal within the meaning of section 1105(d)(3) of the Tax Law.

B. The notice of determination, numbered 90130274 issued by the Sales Tax Bureau against the vendor, John's Pizza, is supported by the provisions of Article 28 of the Tax Law and is correct.

C. The said notice of determination is sustained.

DATED: Albany, New York
April 30, 1971

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER