

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
IDLE HOUR LUNCHEONETTE, INC. ANNE CICIONE
individually and as president, FRANK CICIONE
individually and as vice-president

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales and Use :
Taxes under Article(s) 28 & 29 of the :
Tax Law for the ~~Year(s) XXXX~~ Period(s) :
June 1, 1971 through May 31, 1974

State of New York
County of Albany

John Huhn , 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 13th day of September , 1978 , she served the within

Notice of Determination by ~~(certified)~~ mail upon Idle Hour Luncheonette
Inc., Anne Cicione
individually and as vice-president
Frank Cicione ~~(representative of)~~ the petitioner in the within proceeding,
individually and as vice-pres.

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
Idle Hour Luncheonette, Inc.
as follows: Anne Cicione, individually and as
president and Frank Cicione, individually
and as vice-president
112 Coventry Ave.
Albertson, NY

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 ~~(representative of the)~~
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

13th day of September , 1978

J.P. Walker

John Huhn

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
IDLE HOUR LUNCHEONETTE, INC. ANNE CICIONE
individually and as president, FRANK CICIONE
individually and as vice-president
For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund
of Sales and Use :
Taxes under Article(s) 28 & 29 of the :
Tax Law for the ~~Year(s)~~ Period(s) :
June 1, 1971 through May 31, 1974.

AFFIDAVIT OF MAILING

State of New York
County of Albany

John Huhn , 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 13th day of September , 1978 , she served the within
Notice of Determination by ~~(certified)~~ mail upon Lee M. Albin, Esq.

(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Lee M. Albin, Esq.
1551 Franklin Avenue
Minneola, NY 11501

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 (representative
of the) 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

13th day of September , 19 78

V. P. Walker
25

John Huhn



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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

September 13, 1978

Idle Hour Luncheonette, Inc.
Anne Cicione, individually and as
president
Frank Cicione, individually and as
vice-president
112 Coventry Ave.
Albertson, NY

Please take notice of the **Determination**
of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) **1138 & 1243** 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

Michael Alexander
Michael Alexander
Supervising Tax Hearing
Officer

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
IDLE HOUR LUNCHEONETTE, INC.,	:	
ANNE CICIONE, individually and	:	
as president, FRANK CICIONE,	:	DETERMINATION
individually and as vice-president	:	
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 June 1, 1971	:	
through May 31, 1974.	:	

Applicants, Idle Hour Luncheonette, Inc., Anne Cicione, individually and as president and Frank Cicione, individually and as vice-president, 112 Coventry Avenue, Albertson, New York, 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 period June 1, 1971 through May 31, 1974 (File No. 10164).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 13, 1977 at 9:15 A.M. Applicants appeared by Lee M. Albin, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Laurence Stevens, Esq., of counsel).

ISSUES

I. Whether the State Tax Commission acted properly in sending notice to the purchaser in a bulk sale purchase,

notifying said party not to distribute funds or property to the extent of the amount of New York State's claim until the State Tax Commission had a) determined the seller's liability (if any), b) payment of such determined liability is made to the State, and c) the purchaser has been authorized by the Department of Taxation and Finance to release the funds or property.

II. Whether the Department's actions deprived applicants of due process of law and interfered with the contractual obligation in violation of the New York State Constitution.

FINDINGS OF FACT

1. On July 22, 1974, applicant Idle Hour Luncheonette, Inc. sold its luncheonette business to John Salerno and Jo Ann Salerno for \$2,000.00. Applicant received \$500.00 in cash and a series of fifteen monthly notes for \$100.00 each, payable by National Bank of North America, Willis Avenue, Albertson, New York, with interest at 4%.

2. Bulk sales tax in the sum of \$35.00 was paid.

3. On August 7, 1974, a notice was sent to the seller advising said seller that the necessary arrangements for an examination of the books and records of Idle Hour Luncheonette, Inc. would be made. A Notice of Claim was sent on that same date to the purchaser, Jo Ann Salerno. This Notice advised the purchaser of a possible claim for any New York state and local sales and use taxes and notified the purchaser that regardless of any provisions contained in the sales contract, no distribution of

funds or property (to the extent of the amount of the State's claim) may be made before the State Tax Commission has determined, a) the seller's liability for sales and use taxes (if any), b) payment of such liability has been made to the State, and c) authorization is issued to the purchaser, to release the funds or property. The Notice further advised that failure to comply therewith subjects the purchaser to the liabilities and remedies provided for in section 1141(b) and (c) of the Tax Law, which includes personal liability for the taxes due or thereafter determined to be due from the seller, as well as the issuance of a warrant and levy.

4. On January 20, 1975, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was sent to the Idle Hour Luncheonette, Inc. (seller) at 1119 Willis Avenue, Albertson, New York, and Anne Cicione and Frank Cicione, individually and as officers thereof. Said Notice asserted that a tax was due for the period June 1, 1971 through May 31, 1974 in the sum of \$2,508.83, plus penalty and interest to the date of that notice of \$772.37, for a total amount due of \$3,281.20. Notices were mailed to each individual. The purchaser was also sent a copy of this notice.

5. In January of 1975, the sixth note of the series was presented to the National Bank of North America and was returned to Anne Cicione who then telephoned John Salerno. Mr. Salerno advised that he had received a notice from the State

regarding the liability for sales and use taxes and, on advice from his accountant, he refused to make further payments on this series of notes.

6. The parties stipulate that the amount of tax contained in the Notice of Determination and Demand for Payment of Sales and Use Taxes Due had been recomputed and that the agreed upon tax deficiency is \$2,167.56.

7. By letter dated November 19, 1976, applicants advised the Department of Taxation and Finance that since January of 1975, at or about which time the purchasers were served with a "restraining notice" (see Findings of Fact "3" and "4"), which resulted in nonpayment of the remaining \$1,000.00 due the sellers, no effort had been made by the Department to collect these notes, that the premises have subsequently been destroyed by fire, that the Salernos refuse to pay the notes based on their not being released from liability by the Department and that the notes are now stale. Applicants further advised that the nonpayment of the notes was attributable to the interference of the Department in their business contract. Consequently, applicants asserted that they were entitled to an offset in the amount of \$1,000.00, plus accumulated interest.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides that every person required to collect any tax imposed by Article 28 thereof shall be personally liable for the tax imposed.

B. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated January 20, 1975 was for sales tax required to be collected by applicants for the period June 1, 1971 to May 31, 1974 and was not due because of the bulk sale of the business.

C. That section 1141, subdivision (c), provides that where a sale of business assets is made in bulk the purchaser must notify the Tax Commission of the sale and price at least ten days before taking possession. Also, where the purchaser fails to do so or when the Commission informs the purchaser that a possible claim against the seller for sales tax exists, any money to be paid by the purchaser is subject to a first priority right and lien for any taxes determined to be due from the seller. Furthermore, the purchaser is forbidden to transfer to the seller any money, property or choses in action to the extent of the State's claim. Within 180 days of receipt of notice of the sale, the subdivision further provides that the Commission must give notice to the purchaser of the total amount of any tax due from the seller.

D. That the actions taken by the Department of Taxation and Finance were in compliance with the provisions of section 1141(c) of the Tax Law.

E. That the provisions of New York statutes are presumed constitutional at the administrative level and that the State Tax Commission lacks jurisdiction to consider constitutional questions.

F. That the application of Idle Hour Luncheonette, Inc., Anne Cicione, individually and as president and Frank Cicione, individually and as vice-president is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 20, 1975 is sustained (subject to the agreed reduction of the tax due to \$2,167.56), plus interest.

DATED: Albany, New York

September 13, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER