

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Carmine Barone (Purchaser) :  
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 Period 6/1/72 -11/30/74. :

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 20th day of June, 1980, he served the within notice of Decision by mail upon Carmine Barone (Purchaser), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carmine Barone (Purchaser)  
38 Shenandoah Blvd.  
Nesconset, NY 11767  
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  
20th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Carmine Barone (Purchaser) :  
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 Period 6/1/72 -11/30/74. :

AFFIDAVIT OF MAILING

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 20th day of June, 1980, he served the within notice of Decision by mail upon Frederick B. Miller the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Frederick B. Miller  
114 Old Country Rd.  
Mineola, 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  
20th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 20, 1980

Carmine Barone (Purchaser)  
38 Shenandoah Blvd.  
Nesconset, NY 11767

Dear Mr. Barone:

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 & 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:

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  
Frederick B. Miller  
114 Old Country Rd.  
Mineola, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
MARIO N. RAPAGLIA	:	
and	:	DECISION
CARMINE BARONE (Purchasers)	:	
	:	
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, 1972 through	:	
November 30, 1974.	:	

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Petitioners, Mario N. Rapaglia, 30 Shenandoah Boulevard, Nesconset, New York 11767 and Carmine Barone, 38 Shenandoah Boulevard, Nesconset, New York 11767 (Purchasers), 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 June 1, 1972 through November 30, 1974 (File Nos. 12877 and 12878).

A small claims hearing was held before Raymond J. Siegel and Judy M. Clark, Hearing Officers, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 28, 1978 and March 21, 1979 at 9:15 A.M. and 2:45 P.M. Petitioners appeared by Frederick B. Miller, Esq. The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether assets acquired in the transfer of a business were subject to the bulk sale provisions of the Tax Law or whether the transfer of assets was incidental to the sale of capital stock.

II. Whether the valuation assigned the furniture and fixtures transferred was correct.

FINDINGS OF FACT

1. On October 22, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Pizza Pit, Inc. (Seller) as a result of a field audit. On the same day, the Sales Tax Bureau issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioners Mario N. Rapaglia and Carmine Barone (Purchasers). Both notices were for tax due of \$4,206.38 plus penalty and interest. The tax amount applicable to the transfer of furniture, fixtures and equipment was \$3,990.00 and is the amount at issue.

2. On November 3, 1975, Mario N. Rapaglia and Carmine Barone filed a protest to the results of the audit regarding the transfer of assets.

3. On audit, the Sales Tax Bureau valued the assets based on an installment note for \$57,000.00 and a security agreement which had a schedule of fixtures and equipment, without dollar amounts, attached. The same schedule of fixtures and equipment was attached to the Bill of Sale.

4. On November 4, 1974, Mario N. Rapaglia and Carmine Barone acquired ownership of the business known as Pizza Pit, Inc. for the total sum of \$80,000.00.

5. Petitioners contended that it was their intention to purchase the capital stock of the business and not the business assets. In the alternative they argued that the value of the tangible personal property should be taxed at the book value or the appraised value rather than the value of the installment note of \$57,000.00.

6. The sales agreement, which later became a part of the Bill of Sale, between Pizza Pit, Incorporated and the purchasers contained pertinent provisions as follows:

"1. ...Said sale includes all chattels enumerated on the schedule annexed hereto, together with all other equipment commonly used on or about the premises in connection with the operation of said business..."

"4. The Buyer hereby agrees to pay sales tax arising out of this transaction."

"5. The Seller agrees to deliver to the Buyer at closing, a Bill of Sale conveying free and clear title to all of the furniture, fixtures and equipment set forth on the schedule annexed hereto."

"18. All fixtures and appliances are to be in working order at closing."

"21. In addition to the provisions of paragraph 2 herein, at closing all issued shares of PIZZA PIT, INCORPORATED, to wit, 100 shares, will be tendered by the current shareholders to MARIO N. RAPAGLIA and CARMINE BARONE, the buyers herein, and said buyers" (should be sellers) "shall thereupon transfer 50 shares of the outstanding shares to each of them, the intention being that said buyers are purchasing the corporation as well as fixtures, goodwill, etc."

7. The Bill of Sale of Business, noted this transaction as a "Bulk Transfer", and contained the following footnote: "Payment is being made to said stockholders individually inasmuch as a part of this sale consists of the transfer of all shares in PIZZA PIT, INCORPORATED to the transferee."

8. The book value of the furniture, fixtures and equipment at the time of transfer was \$12,989.00. Assets were not revalued after the transfer was made. Common stock purchased was valued at \$23,935.00.

9. The applicants acted in good faith.

CONCLUSIONS OF LAW

A. That the transfer of business assets constituted a bulk sale and is subject to the provisions of section 1141(c) of the Tax Law; and that the purchase of stock by the petitioners Mario N. Rapaglia and Carmine Barone was in addition to the purchase of furniture, fixtures, equipment, goodwill, etc. as evidenced by the Bill of Sale.

B. That the tax is due from the sale of the furniture, fixtures and equipment on the book value (\$12,989.00) at the time of sale as noted in Finding of Fact "8". That such book value accurately represented the purchase price of the assets which was evidenced by the fact that the assets were not revalued after the purchase.

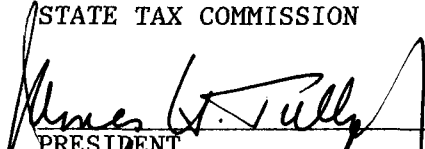
C. That the penalties and interest in excess of the minimum statutory rate are cancelled.

D. That the petition of Mario N. Rapaglia and Carmine Barone (Purchasers) is granted to the extent indicated in Conclusions of Law "B" and "C" above; that the Audit Division is hereby directed to accordingly modify the Notice and Demand for Payment of Sales and Use Taxes Due issued October 22, 1975 against the purchasers; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

**JUN 20 1980**

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER