

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Ritorio Villa, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Sales & Use Tax :

under Article 28 of the Tax Law

for the Period 6/1/72-5/31/75. :

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 28th day of September, 1979, he served the within notice of Determination by mail upon Ritorio Villa, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ritorio Villa, Inc.

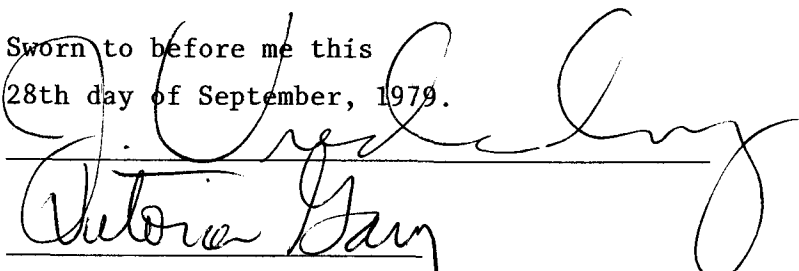
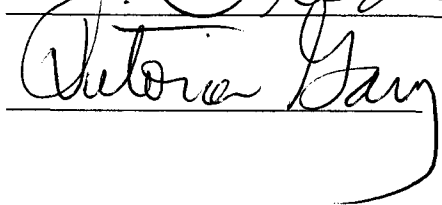
6001 14th Ave.

Brooklyn, NY 11219

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  
28th day of September, 1979.

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Ritorio Villa, Inc. :

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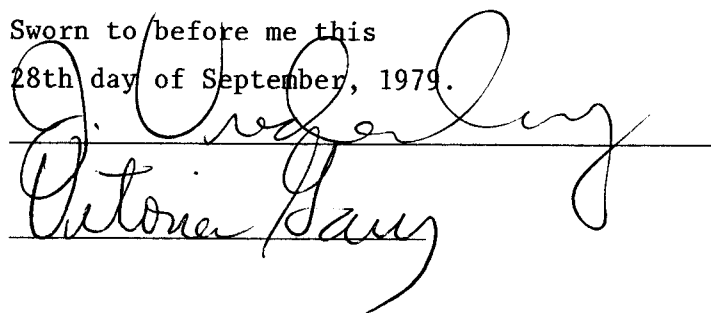
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Determination by mail upon James J. Cally the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. James J. Cally  
150 Broadway  
New York, 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  
28th day of September, 1979.

  
\_\_\_\_\_  
Victoria Garry

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

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

Ritorio Villa, Inc.  
6001 14th Ave.  
Brooklyn, NY 11219

Gentlemen:

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,

A handwritten signature in dark ink, appearing to read "John J. Sollecito", written in a cursive style.

cc: Petitioner's Representative  
James J. Cally  
150 Broadway  
New York, NY  
Taxing Bureau's Representative

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Application	:	
	:	
of	:	
	:	
VILLA RITORTO, INC.	:	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 Period June 1, 1972 through	:	
May 31, 1975.	:	

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Applicant, Villa Ritorto, Inc., 6001 14th Avenue, Brooklyn, New York 11219, 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, 1972 through May 31, 1975 (File No. 14033).

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 10, 1979 at 9:15 A.M. Applicant appeared by James J. Cally, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the determination of additional taxes due, based on a field audit using a markup-of-purchases method of auditing, is correct.

FINDINGS OF FACT

1. Applicant, Villa Ritorto, Inc., operates a restaurant selling food, beer, liquor and wine.
2. On March 2, 1976 as a result of a field audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for \$20,893.45, plus penalty and interest of \$8,149.35, for a total of \$29,042.80.

3. Liquor and wine purchase invoices were tested for the month of March 1975. (The entire month was not tested due to the lack of invoices.) This test produced a markup of 374%. Before arriving at the markup percentage, an allowance of 15% was made for spillage and waste, as well as an allowance for the theft of merchandise which was based on police reports.

Beer purchase invoices were tested for the month of April 1975. (The entire month was not tested due to the lack of invoices.) This test produced a markup of 92%.

The above tests were based on applicant's selling prices which were in effect during March and April of 1975, and on applicant's serving size per drink.

Total food purchases were arrived at by deducting liquor, wine and beer purchases from the adjusted total purchases. From this amount, food used in employee meals was deducted and the resulting figure was marked up 125%.

The total adjusted taxable sales of \$522,895.66 was determined after applying the above percentages to the respective purchase totals. Applicant reported sales of \$249,432.00, and the assessment was based on the difference of \$273,463.66. The additional tax which was due for the above items totaled \$20,185.06.

4. An overcollection test was performed on the guest checks, which resulted in an overcollection rate of 1.74%. This percentage was applied to the tax determined to be due on taxable sales, for an overcollection tax of \$671.57.

5. Fixed assets for the audit period were examined, which disclosed that tax had not been paid on a \$526.00 purchase; therefore, a tax of \$36.82 was assessed.

6. Applicant contended the following:

a. No allowance was made for losses due to the "black-outs".

- b. No allowance was made for merchandise that was thrown out.
- c. Not enough of an allowance was made for theft.
- d. No allowance was made for drinks given away.

Applicant did not submit any proof or substantial evidence to support its contentions.

7. Applicant stated that the one-month test period for beverages was not conclusive, and that no copies of the auditor's work papers were made available for its examination.

8. When the audit was performed, applicant was informed of the months that were going to be used for the test periods. Applicant did not object, nor did it offer any alternative period. On February 9, 1977, applicant received photo copies of the portions of the field audit work papers which it requested.

9. Applicant did not at any time submit facts or figures, or produce any records to disprove the accuracy of the field audit.

CONCLUSIONS OF LAW

A. That the examination of applicant's books and records by the Sales Tax Bureau was properly conducted in accordance with section 1138(a) of the Tax Law. The resultant findings as to the amount of additional sales tax due are correct.

B. That the application of Villa Ritorto, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on March 2, 1976 is sustained.

DATED: Albany, New York

SEP 28 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER