STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Victor Mayer & Sons Caterers, Inc. :
Victor, Samuel & David Mayer, Indiv. & as Officers 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 9/1/70-2/28/75. :

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 3rd day of October, 1980, he served the within notice of Determination by mail upon Victor Mayer & Sons Caterers, Inc., Victor, Samuel & David Mayer, Indiv. & as Officers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Victor Mayer & Sons Caterers, Inc.
Victor, Samuel & David Mayer, Indiv. & as Officers
1255 Hewlett Plaza
Hewlett, NY 11557

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
3rd day of October, 1980.

Arthur Bank

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of		
Victor Mayer & Sons Caterers, Inc.	:	
Victor, Samuel & David Mayer, Indiv. & as Officers		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 9/1/70-2/28/75.	:	

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 3rd day of October, 1980, he served the within notice of Determination by mail upon Burton Feldman 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. Burton Feldman
Weiss & Feldman
11 W. 42nd St.
New York, NY 10036

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
3rd day of October, 1980.

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

October 3, 1980

Victor Mayer & Sons Caterers, Inc.
Victor, Samuel & David Mayer, Indiv. & as Officers
1255 Hewlett Plaza
Hewlett, NY 11557

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:

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
Burton Feldman
Weiss & Feldman
11 W. 42nd St.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :

of :

VICTOR MAYER and SONS CATERERS, INC. :
VICTOR MAYER, SAMUEL MAYER and DAVID MAYER, Individually and as Officers :

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 September 1, 1970 through February 28, 1975. :

Applicants, Victor Mayer and Sons Caterers, Inc., together with Victor Mayer, Samuel Mayer and David Mayer, individually and as officers, 1255 Hewlett Plaza, Hewlett, New York 11557, 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 September 1, 1970 through February 28, 1975 (File No. 16263).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 7, 1977 at 2:45 P.M. Applicant appeared by Burton Feldman, CPA and by Murray A. Weiss, CPA. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the gross amount of gratuities which were charged to customers of a caterer and separately billed to them are subject to sales taxes, when the caterer turns over the gratuities to employees after deducting the cost of "fringe benefits".

FINDINGS OF FACT

1. Applicant Victor Mayer and Sons Caterers, Inc. (the "corporation") timely filed sales and use tax returns for the period September 1, 1970 through February 28, 1975, and paid the sales and use taxes shown to be due on the returns.

2. On July 24, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Victor Mayer and Sons Caterers, Inc., and against Victor Mayer, Samuel Mayer and David Mayer, individually and as officers, assessing them for sales and use taxes due from the corporation. Said Notice was for $25,225.08, plus penalty and interest of $9,720.54, for a total due of $34,945.62. By a Notice of Assessment Review dated August 27, 1976, the amount assessed was adjusted to $25,175.35.

3. By executed written consents, the period of limitations for making assessment of sales and use taxes for the period beginning September 1, 1970 was extended to December 20, 1975.

4. The corporation operated as a kosher caterer for such functions as weddings, parties, bar mitzvahs, etc. The catering was done in homes, hotels and temples, both within and without New York State. A small amount of catering was done in hotels on a resale basis where applicant provided only the food.

5. The officers of the corporation were as follows: Victor Mayer, president; Samuel Mayer, vice-president; and David Mayer, secretary.

6. In most of its catering contracts, the corporation separately stated the charge to the customer for tips or gratuities on the invoices. Where the gratuity or tips charge was not separately stated, applicant collected sales tax on the entire catering charge. Where the tips or gratuity charge was separately stated, the corporation did not charge sales tax, nor did it include that amount in its reported taxable sales.

7. The Sales Tax Bureau's auditor used the three months ending May 31, 1973 as a test period. Payroll records showed that the corporation collected the sum of $36,686.96 from its customers as gratuities. Tips paid to employees were recorded as $28,146.30. The corporation computed 13 percent of the gratuities charged as expenses attributable to handling "fringe benefits" for the employee. These were deducted from the gross gratuities collected. Such so-called "fringe benefits" included the employer's share of payments for Federal social security (FICA), unemployment insurance (NYSUI), Federal unemployment (FUI), compensation insurance, liability insurance and disability insurance. For the test period March, April and May of 1973, applicant's records show that tips charged to customers amounted to $36,686.96, but tips paid to employees, plus the expense attributed to handling these tips, amounted to $38,381.32.

8. The corporation did not retain any of the gratuities it collected from customers. Applicant did apply part of the employees' gratuities to its own expenses, such as the employer's share of FICA, FUI, NYSUI, compensation, liability and disability insurance.

9. In a letter sent by the Chief of Instructions and Interpretations Unit of the New York State Department of Taxation and Finance dated November 27, 1970, the accountants for the corporation were informed that:

> "Tips and gratuities of any nature which are shown as a separate item and described as such on the bill given to the customer are not subject to sales tax provided no part of the charge is retained by the caterer."

10. The corporation relied on the interpretations it placed on the information relayed to it by its certified public accountant, and it reported and paid sales taxes accordingly.

11. The books and records of applicant were adequate and accurate.

CONCLUSIONS OF LAW

A. That 20 NYCRR 527.8(1), which was effective September 1, 1976, provides as follows:

> (1) Gratuities and service charges. Any charge, made to a customer, is taxable as a receipt from the sale of food or drink unless:
>
> (i) the charge is separately stated on the bill or invoice given to the customer; and
>
> (ii) the charge is specifically designated as a gratuity; and
>
> (iii) all such monies received are paid over in total to employees.

However, under the interpretation of section 1101(d) of the Tax Law prior to the promulgation of 20 NYCRR 527.8(1), the gratuities were deemed exempt from sales taxes if they were separately billed and if no part of the gratuities was retained by the caterer. Accordingly, the amount of the gratuities separately billed to the customers of Victor Mayer and Sons Caterers, Inc. was not subject to sales tax to the extent that such gratuities were turned over to employees. That portion of the gratuities diverted by the caterer to cover the employer's expenses attributable to tips is part of the gross price paid by the customer, and should be subject to sales tax.

B. That the Audit Division is directed to redetermine from the facts in the file, the amount of sales taxes due for the period September 1, 1970 through February 28, 1975, in accordance with Conclusion of Law "A".

C. That the application of Victor Mayer and Sons Caterers, Inc. and Victor Mayer, Samuel Mayer and David Mayer, individually and as officers, is granted to the extent that the penalty and interest above the minimum are waived; that the Audit Division is directed to modify the Notice of Determination

and Demand for Payment of Sales and Use Taxes Due dated July 25, 1975 in accordance with the Notice of Assessment Review dated August 27, 1976, and in accordance with Conclusion of Law "B"; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York
OCT 0 3 1980

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

New York State
Department of
TAXATION
and FINANCE

Tax Appeals Bureau

Date 1-9-88

To STC.

Please associate F case: re: Remailed
Nectar MAYER & SONS CATERERS Inc.
Nectar, Samuel & David Mayer Indiv & as
officers — article 28-29

Rep stated he didn't receive his copy.
Taxpayer - did

M-75.1

Connie H.
TAB

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition of Victor Mayer & Sons Caterers, Inc. Victor, Samuel & David Mayer, Indiv. & as Officers 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 9/1/70-2/28/75.	:	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 9th day of January, 1981, he served the within notice of Determination by mail upon Burton Feldman 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. Burton Feldman
Weiss & Feldman
475 Fifth Avenue
New York, NY 10017

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
9th day of January, 1981.

Connie P. Hagelund

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

JAMES H. TULLY JR., PRESIDENT
THOMAS H. LYNCH
FRANCIS R. KOENIG

January 9, 1981

Mr. Burton Feldman
Weiss and Feldman
475 Fifth Avenue
New York, NY 10017

Re: Newman & Levanthal Caterers, Inc.
Victor Mayer Caterers, Inc.

Dear Mr. Feldman:

Enclosed is a copy of determination dated October 3, 1980 for Victor Mayer Caterers, Inc.

The reason you did not receive the decision is that it was mailed to the address listed in the file, namely 11 West 42nd Street, New York, New York 10036. Accordingly, the current address for your firm has been recorded for Newman and Levanthal Caterers, Inc.

Please advise as to when a hearing may be scheduled for Newman and Leventhal Caterers, Inc.

Very truly yours,

Kathy Pfaffenbach
Calendar Clerk

cc: Newman & Leventhal Caterers, Inc.