

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Post Road Caterers, 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 & 29 of the Tax Law  
for the Period 9/1/71-4/30/74. :

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 3rd day of October, 1980, he served the within notice of Determination by mail upon Post Road Caterers, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

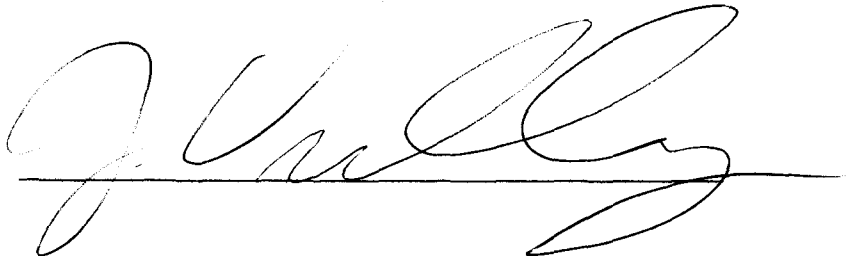
Post Road Caterers, Inc.  
c/o Henry Lauritano  
9 Cypress Peak La.  
Montvale, NJ 10745

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.

John H. Bank



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Post Road Caterers, 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 & 29 of the Tax Law  
for the Period 9/1/71-4/30/74. :

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 3rd day of October, 1980, he served the within notice of Determination by mail upon Thomas Cartelli and Matthew Stern 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. Thomas Cartelli and Matthew Stern  
1334 E. Gunhill Rd.  
Bronx, NY 10469

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.

Robert Brink

J. Vredenburg

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

October 3, 1980

Post Road Caterers, Inc.  
c/o Henry Lauritano  
9 Cypress Peak La.  
Montvale, NJ 10745

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  
Thomas Cartelli and Matthew Stern  
1334 E. Gunhill Rd.  
Bronx, NY 10469  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Application	:	
of	:	
POST ROAD CATERERS, 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 September 1, 1971 through April 30,	:	
1974.	:	

---

Applicant, Post Road Caterers, Inc., c/o Henry Lauritano, 9 Cypress Peak Lane, Montvale, New Jersey 10745, 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, 1971 through April 30, 1974 (File No. 10286).

A small claims hearing was held before Raymond J. Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 11, 1978, and was continued on January 8, 1979 at 10:45 A.M. Applicant appeared by Thomas Cartelli, Esq., and Matthew Stern, CPA. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

- I. Whether applicant is liable for additional sales tax based on the markup computations for liquor sales.
- II. Whether applicant is liable for sales tax on "customers deposits."
- III. Whether applicant is liable for sales tax on "gratuities" charged its customers.

FINDINGS OF FACT

1. Applicant, Post Road Caterers, Inc. (a/k/a Lauritano's Restaurant),

filed New York State and local sales and use tax returns for the period September 1, 1971 through April 30, 1974. For said period, applicant executed a "Consent Extending Period of Limitation for Assessment of Sales and Use Taxes pursuant to Articles 28 and 29 of the Tax Law" on October 3, 1974, extending the determination date until December 19, 1975.

2. For the period at issue, applicant operated a catering business which sold food and liquor.

3. On May 14, 1975, 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 taxes due of \$34,570.77, plus penalty and interest of \$11,994.62, for a total due of \$46,565.39.

4. On audit, the Sales Tax Bureau determined that sales per books and sales reported on income tax returns were in substantial agreement. However, the sales reported on sales tax returns were understated by \$271,390.00 when compared to the sales reported on the income tax returns. The amount understated on the sales tax returns consisted of unreported gratuities of \$190,177.00; income of \$29,417.00 from the sale of favors and flowers and other miscellaneous sources; and deposits from clients who cancelled affairs of \$51,796.00.

The Sales Tax Bureau also conducted markup tests for liquor. Using the months of September and October of 1973 as the test period, the examiner made three separate markup tests for liquor because the selling prices varied based on whether liquor was served at:

- a) rolling bars at catered affairs
- b) individual tables at catered affairs
- c) the restaurant bar

The resulting markups were found to be: 275 percent for the rolling bar; 140 percent for liquor served at the tables; and, 300 percent for the restaurant

bar. The auditor then determined that the total liquor purchases were \$170,288.00. Of this amount \$105,366.00 was for catered affairs (of which 80 percent were estimated to be sold at rolling bars and 20 percent was sold at tables) and the balance of \$64,922.00 was sold at the restaurant bar. The examiner determined that the beer purchases represented an insignificant percentage of the total liquor purchases and, therefore applied the restaurant markup to beer. The application of these markups to purchases resulted in additional liquor receipts of \$186,974.00 after adjustment for nontaxable sales. Applicant's records reflected a food markup of 163 percent, which was accepted by the Sales Tax Bureau.

The adjusted taxable sales as computed by the examiner, resulted in a 41.14 percent understatement of sales. The percentage thus determined was applied to sales reported by the applicant for the entire period at issue and resulted in additional taxable sales of \$439,402.00.

5. Applicant's records were insufficient for the Sales Tax Bureau to determine the exact amount of applicant's sales tax liability.

6. Applicant contended that the Sales Tax Bureau's examiner incorrectly allocated 80 percent of the total catered liquor sales to the rolling bar and only 20 percent served at the customers' tables; and, as a consequence, the computation of additional sales was distorted for the reason that the markup on the rolling bar was determined by the examiner to be far greater than the markup on liquor served at the table. Thereupon, the parties agreed that the applicant's representative was to submit to the Audit Division's representative a detailed analysis of sales invoices for the period September 1, 1973 through November 30, 1973. In addition, the applicant's representative was to submit to the examiner detailed documents supporting the nontaxability of gratuities.

7. On August 22, 1978, the Audit Division's examiner reaudited the applicant's catering records. Using the months of September through November 1973 as the test period, the examiner determined that 32 percent of catering liquor sales was derived from the rolling bar, and 68 percent from bottled liquor served at the table. The examiner then allocated the liquor purchases attributable to the rolling bar and table service and applied thereto, the previously obtained markup percentages. Based on the foregoing, the examiner prepared a revised assessment, as follows:

Food Sales Accepted		\$ 805,330.00
Gratuities		190,177.00
Misc. Favors & Flowers		43,636.00
Check Room		11,297.00
Supplies		1,061.00
Misc. Tobacco		1,041.00
Telephone & Comm.		10,045.00
Liquor Sales Reported		427,881.00
Liquor Sales Increase		84,690.00
Deposit Adjustment		51,796.00
		<u>\$1,626,954.00</u>
Less Telephone Comm.	\$10,045.00	
Nontaxable Sales 37% or 71.565	<u>26,477.00</u>	36,522.00
Taxable Sales Audit		<u>1,590,432.00</u>
Taxable Sales Reported		<u>1,199,314.00</u>
Increase		391,118.00
Tax at 7%	<u>\$27,378.00</u>	

8. Applicant contended that the markup of 300 percent for liquor sold in the restaurant bar was inaccurate. However, applicant failed to submit any documentary evidence to show wherein the markup was incorrectly computed by the examiner.

9. Applicant argued that the account classified as "Customers Deposits", is not subject to sales tax. The amount in this account resulted when a customer made a deposit for a future event which was either postponed or cancelled. It contended that the deposits had either been applied against postponed affairs or repaid to customers by cash or check. Applicant further contended that its bookkeeper inadvertently failed to charge the customers'

deposit account when monies were repaid or applied to postponed affairs.

10. Applicant also contended that the Audit Division's inclusion of waiters' gratuities in taxable sales was in contravention of the Sales Tax Law and Regulations promulgated thereunder. Applicant argued that the Audit Division improperly interpreted the Tax Law and Regulations to instant facts by subjecting gratuities, clearly marked as such in its billing to customers and paid over in total as wages to its waiters, to sales tax.

11. The applicants' gratuity charges were separately stated and such charges were labeled gratuity. The gratuities collected by the applicant from its clients were paid over to the waiters less any withholding for payroll taxes.

#### CONCLUSIONS OF LAW

A. That the markup computations and taxable percentages for the additional liquor sales are reduced as per Finding of Fact "7" to reflect the adjustments determined on re-examination of applicant's records and such findings are proper within the meaning and intent of section 1138(a) of the Tax Law.

B. That the "customer deposits" do not constitute a receipt within the meaning and intent of section 1105(d)(i) of the Tax Law; therefore, applicant is not liable for the tax on the "customer deposits".

C. That Sales Tax Regulation 20 NYCRR 527.8(1) states that charges shall be a gratuity if:

(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.

That applicant's charges for gratuities which were separately stated on the invoices, as per Finding of Fact "11", are not subject to the imposition of the sales tax; therefore, such taxes determined to be due are cancelled.

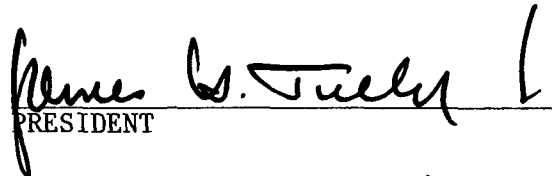


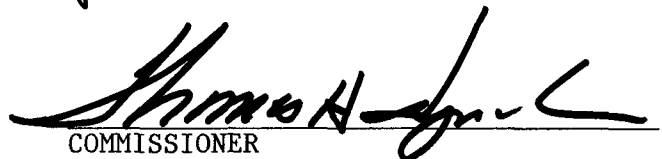
D. That the application of Post Road Caterers, Inc. is granted to the extent indicated in Conclusions of Law "A", "B" and "C" above. The Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 14, 1975; and that, except as so granted, the application is in all other respects denied.

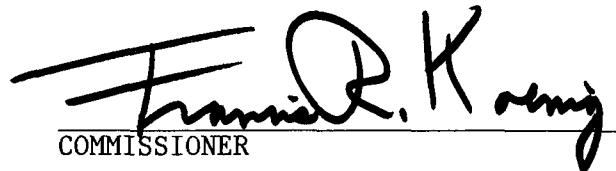
DATED: Albany, New York

STATE TAX COMMISSION

OCT 03 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER