

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
San Marco Leone Corp. :  
and Adam Liotti, Officer : 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 3/1/73 - 8/31/75. :

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 14th day of March, 1980, he served the within notice of Determination by mail upon San Marco Leone Corp., and Adam Liotti, Officer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

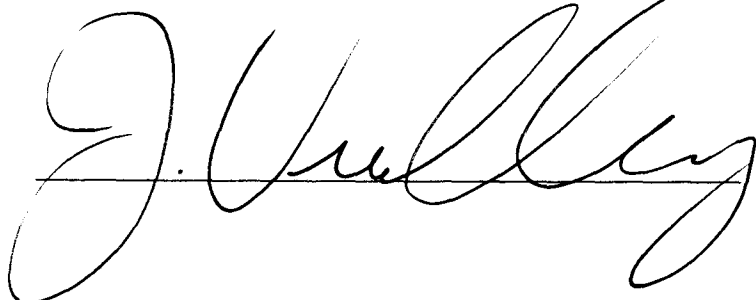
San Marco Leone Corp.  
and Adam Liotti, Officer  
5600 Claredon Rd.  
Brooklyn, NY 11203

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  
14th day of March, 1980.

Joanne Knapp



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
San Marco Leone Corp. :  
and Adam Liotti, Officer : 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 3/1/73 - 8/31/75. :

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 14th day of March, 1980, he served the within notice of Determination by mail upon Matthew Dollinger 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. Matthew Dollinger  
Dollinger, Gonski & Grossman  
One Old Country Rd.  
Carle Place, NY 11514

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  
14th day of March, 1980.

Joanne Knapp

J. Vredenburg

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

March 14, 1980

San Marco Leone Corp.  
and Adam Liotti, Officer  
5600 Claredon Rd.  
Brooklyn, NY 11203

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  
Matthew Dollinger  
Dollinger, Gonski & Grossman  
One Old Country Rd.  
Carle Place, NY 11514  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
	:	
of	:	
	:	
SAN MARCO LEONE CORPORATION and	:	DETERMINATION
Adam Liotti, Individually and as Officer :	:	
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 March 1, 1973 through August 31,	:	
1975.	:	

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Applicants, San Marco Leone Corporation, and Adam Liotti, individually and as officer, 5600 Claredon Road, Brooklyn, New York 11203, 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 March 1, 1973 through August 31, 1975 (File No. 15926).

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 1:15 P.M. and February 21, 1979 at 1:00 P.M. Applicant appeared by Matthew Dollinger, Esq. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the acquisition of fixed assets by applicants constituted a retail sale as defined by section 1101(b)(4) of the Tax Law.

FINDINGS OF FACT

1. On June 18, 1976, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicants, San Marco Leone Corporation and Adam Liotti, individually and as officer, for the period March 1, 1973 through August 31, 1975, for tax due of \$3,155.23, plus penalty and interest of \$1,257.97.

2. On July 20, 1976, applicants filed a timely protest to the above notice.

3. The Audit Division determined that applicant San Marco Leone Corporation began its business operation on March 1, 1973. In accordance with this determination, the Audit Division held that fixed assets valued on applicant's books at \$36,660.00 as of March 1, 1973 were taxable, resulting in tax due of \$2,566.20. The Audit Division asserted this tax on the grounds that the fixed assets were acquired by applicant from Jolee Restaurant, Inc. and that the acquisition constituted a retail sale which was subject to the imposition of sales tax. The balance of the assessment of \$589.03 was based on a markup of purchases and is not at issue.

4. Prior to October 12, 1971, applicant Adam Liotti was an officer and 50 percent shareholder of Jolee Restaurant, Inc. On October 12, 1971, he acquired the remaining shares of stock of Jolee Restaurant, Inc. and became the sole stockholder. On January 11, 1972, applicant Adam Liotti transferred all the issued shares of Jolee Restaurant, Inc. to San Marco Leone Corporation in consideration for all the issued shares of San Marco Leone Corporation on its formation.

5. Applicants contended that applicant San Marco Leone Corporation purchased all the outstanding capital stock of Jolee Restaurant, Inc. and that such a transaction was not a bulk sale, nor was the transaction a retail sale.

6. Applicants did not produce any documentary evidence or offer any testimony to show that Jolee Restaurant, Inc. was dissolved and, if so, what accounting transaction was used to enter the fixed assets on the books and records of applicant San Marco Leone Corporation.

CONCLUSIONS OF LAW

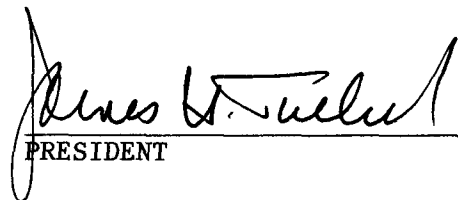
A. That the fact that applicant San Marco Leone Corporation purchased the outstanding capital stock of Jolee Restaurant, Inc. does not explain how the fixed assets came to be recorded on the books of applicant San Marco Leone Corporation. The transaction cannot be characterized as a transfer of tangible personal property to a corporation in consideration for its capital stock because it has not been shown that applicant San Marco Leone Corporation transferred its capital stock in consideration for the fixed assets. That accordingly, the acquisition of fixed assets by applicant San Marco Leone Corporation constituted a retail sale as defined by section 1101(b)(4) of the Tax Law and that such sale is subject to the imposition of sales tax within the meaning and intent of section 1105(a) of the Tax Law.

B. That the application of San Marco Leone Corporation and Adam Liotti, individually and as officer is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 18, 1976 is sustained.

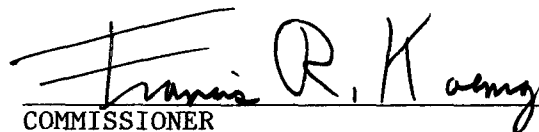
DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER