

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Michael & Jean Del Grasso :
d/b/a 7-11 Store No. 11459 :
: 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 :
Periods Ended 5/31/73 - 2/28/76. :

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 October, 1981, he served the within notice of Determination by certified mail upon Michael & Jean Del Grasso, d/b/a 7-11 Store No. 11459 the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael & Jean Del Grasso
d/b/a 7-11 Store No. 11459
163 Maun Ave.
Staten Island, NY 10314

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
9th day of October, 1981.

Carrie A. Haglund

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Michael & Jean Del Grasso :
d/b/a 7-11 Store No. 11459 :
: 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
Periods Ended 5/31/73 - 2/28/76. :

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 October, 1981, he served the within notice of Determination by certified mail upon Eugene O. Cobert the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eugene O. Cobert
60 East 42nd St., Suite 1765
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 October, 1981.

Annie A. Hagelund

J. Vredenburg

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

October 9, 1981

Michael & Jean Del Grasso
d/b/a 7-11 Store No. 11459
163 Maun Ave.
Staten Island, NY 10314

Dear Mr. & Mrs. Del Grasso:

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
Eugene O. Cobert
60 East 42nd St., Suite 1765
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
MICHAEL and JEAN DEL GRASSO	:	CORRECTED
d/b/a 7-11 Store No. 11459	:	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 Periods Ended May 31, 1973 through	:	
February 28, 1976.	:	

Applicants, Michael and Jean Del Grasso d/b/a 7-11 Store No. 11459, 163 Mann Avenue, Staten Island, New York, 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 periods ended May 31, 1973 through February 28, 1976 (File No. 18895).

A formal hearing was commenced before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 27, 1979 at 1:15 P.M. and was continued to conclusion at the same location before Frank A. Romano, Hearing Officer, on March 24, 1980 at 9:15 A.M. Applicants appeared by Eugene O. Cobert, Esq. The Audit Division appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the applicants are liable for additional sales tax assessed pursuant to audit for the periods ended May 31, 1973 through February 28, 1976.

FINDINGS OF FACT

1. New York State and local sales and use tax returns for periods ended May 31, 1973 through February 28, 1976 were prepared and filed by Southland Stores, Dallas, Texas (hereinafter sometimes called "Southland") as franchisor, on behalf of its franchisee, Michael and Jean Del Grasso d/b/a 7-11 Store No. 11459, and sales taxes were remitted in the amounts reflected thereon.
2. On February 18, 1977, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to applicants in the amount of \$36,429.16 for sales taxes, plus \$17,746.67 in penalties and interest, making a total of \$54,175.83 due and owing for the periods ended May 31, 1973 through February 28, 1976.
3. A timely petition (and power of attorney) was filed solely on behalf of applicant Michael Del Grasso, and such perfected petition shall be deemed said applicant's perfected application for revision of the aforesaid determination and request for hearing in connection therewith pursuant to section 1138 of the Tax Law and section 601.5 of the Rules of Practice and Procedure of the State Tax Commission. On or about May 3, 1979, the Department of Taxation and Finance served its answer.
4. No application (or power of attorney) was filed on behalf of applicant Jean Del Grasso although said applicant did appear at the formal hearing on both July 27, 1979 and March 24, 1980.
5. For the periods in question, applicants, a New York partnership, operated a retail food and general merchandising store pursuant to franchise agreement with Southland, which store was located at 2064 Victory Boulevard, Staten Island, New York.

6. Applicants ceased doing business in or about March, 1976, failing to recover their initial capital investment, and merely surrendered the store to Southland.

7. The auditor for the Audit Division visited the applicants' place of business, and for the test period of April, 1974, examined the general ledger, purchase invoices, New York State sales tax returns and Federal income tax returns, all for the periods ended March 31, 1973 through February 28, 1976.

8. In or about February, 1977, a field audit report was filed, claiming a deficiency in sales and use taxes against the applicants in the amount of \$36,429.16, plus interest and penalty.

9. The applicants contested the claimed deficiency on the following grounds: (a) the Audit Division utilized a ratio of 43.5% of purchases as taxable, which "taxable ratio" was improper and highly inflated; (b) sales of non-taxable items were improperly computed in that the greatest percentage of items purchased (and sold) by the applicants' store were of non-taxable items, such as milk and other dairy products, cold cuts, bread, cake, canned and frozen goods, potato chips, butter and the like; (c) the nature and location of the applicants' business were not considered; (d) a "markup" percentage of 63.9% was arbitrary and unduly high; (e) the one-month sample or test period was neither sufficient nor representative; (f) the allowance for pilferage and shortages was not considered or, if considered, was inadequate; (g) the allowance for waste and spoilage was not considered or, if considered, was inadequate; (h) the dollar amount of "taxable purchases" was inflated; (i) the tax on the sale of cigarettes was improperly computed; and (j) the "average" tax rate of .0764% as applied by the Audit Division was improper and excessive.

10. The books and records maintained by applicants and Southland, which were readily accessible to the Audit Division, were adequate for the Audit Division to determine the exact tax liability of applicants.

CONCLUSIONS OF LAW

A. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit.

(Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

B. That the applicants maintained adequate books and records from which the actual tax could have been determined. That, therefore, the Audit Division's resort to the use of a test period is incorrect.

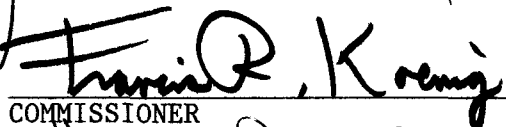
C. That the application of Michael and Jean DelGrasso is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 18, 1977 is cancelled.

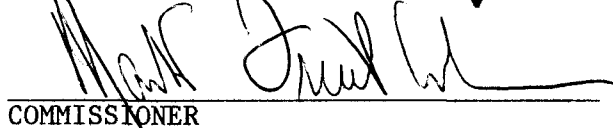
DATED: Albany, New York

OCT 09 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Michael & Jean DelGrasso :

d/b/a 7-11 Store 11459 :

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 - 2/28/76.

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 5th day of June, 1981, he served the within notice of Determination by mail upon Michael & Jean DelGrasso, d/b/a 7-11 Store 11459, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael & Jean DelGrasso
d/b/a 7-11 Store 11459
163 Mann Ave.
Staten Island, 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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
5th day of June, 1981.

Carrie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Michael & Jean DelGrasso
d/b/a 7-11 Store 11459

:

:

:

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 - 2/28/76.

State of New York
County of Albany

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Mr. Eugene O. Cobert
60 E. 42nd St., Suite 1765
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
5th day of June, 1981.

Cornie A. Haglund

J. Vredenburg

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

June 5, 1981

Michael & Jean DelGrasso
d/b/a 7-11 Store 11459
163 Mann Ave.
Staten Island, NY

Dear Mr. & Mrs. DelGrasso:

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
Eugene O. Cobert
60 E. 42nd St., Suite 1765
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
MICHAEL and JEAN DEL GRASSO	:	
d/b/a 7-11 Store No. 11459	:	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 Periods Ended May 31, 1973 through	:	
February 28, 1976.	:	

Applicants, Michael and Jean Del Grasso d/b/a 7-11 Store No. 11459, 163 Mann Avenue, Staten Island, New York, 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 periods ended May 31, 1973 through February 28, 1976 (File No. 18895).

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ISSUES

I. Whether the applicants are liable for additional sales tax assessed pursuant to audit for the periods ended May 31, 1973 through February 28, 1976.

II. Whether applicants are persons required to collect sales and use taxes within the meaning and intent of section 1131(1) of the Tax Law; and, if so required, whether said applicants are personally liable, within the meaning and intent of section 1133(a) of the Tax Law, for failing to collect sales and use taxes assessed to and unpaid for the periods in question.

FINDINGS OF FACT

1. New York State and local sales and use tax returns for periods ended May 31, 1973 through February 28, 1976 were prepared and filed by Southland Stores, Dallas, Texas (hereinafter sometimes called "Southland") as franchisor, on behalf of its franchisee, Michael and Jean Del Grasso d/b/a 7-11 Store No. 11459, and sales taxes were remitted in the amounts reflected thereon.

2. On February 18, 1977, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to applicants in the amount of \$36,429.16 for sales taxes, plus \$17,746.67 in penalties and interest, making a total of \$54,175.83 due and owing for the periods ended May 31, 1973 through February 28, 1976.

3. A timely petition (and power of attorney) was filed solely on behalf of applicant Michael Del Grasso, and such perfected petition shall be deemed said applicant's perfected application for revision of the aforesaid determination and request for hearing in connection therewith pursuant to section 1138 of the Tax Law and section 601.5 of the Rules of Practice and Procedure of the State Tax Commission. On or about May 3, 1979, the Department of Taxation and Finance served its answer.

4. No application (or power of attorney) was filed on behalf of applicant Jean Del Grasso although said applicant did appear at the formal hearing on both July 27, 1979 and March 24, 1980.

5. For the periods in question, applicants, a New York partnership, operated a retail food and general merchandising store pursuant to franchise agreement with Southland, which store was located at 2064 Victory Boulevard, Staten Island, New York.

6. The store in which the applicants' business premises was located was owned by Southland and the leasing of said premises to the applicants was included in the franchise agreement.

7. Pursuant to the franchise agreement, the business of the applicants was operated as follows: (i) The applicants made an initial capital investment of \$20,000.00, which Southland and the applicants referred to as the applicants' "Net Worth"; (ii) if there was a profit (i.e., the monies which the applicants collected on sales and transmitted to Southland exceeded charges), the applicants' share would be forty-four (44%) percent which would be credited to and increase their Net Worth; (iii) if, however, the monies collected and transmitted were less than the charges, the deficit would be debited to and decrease the applicants' Net Worth; (iv) the charges to the applicants included (but was not limited to) cost of goods, payroll, rent, utilities, and taxes; (v) shortages due to spoilage and waste could not be charged back to Southland; (vi) the applicants were required to purchase inventory from vendors designated by Southland (referred to as "program vendor or vendors"); (vii) the delivery from a program vendor would be invoiced (showing the amount and type of goods delivered with their unit prices), which invoices would be receipted by the applicants and turned over at the end of each day to Southland's agent who made daily pick-ups so that Southland could make direct payment to the program vendors; (viii) delivery of beer from a program vendor was an exception and treated separately in that the applicants

were given special checks by Southland to be issued by the applicants directly to the beer vendors who insisted on COD terms; (ix) in the event program vendor could not supply the necessary goods, the applicants could, and did place orders with a non-program vendor, in which instance, the applicants would pay cash directly to the non-program vendor for each delivery, complete a "paid-out" slip and submit that slip and the invoice, together with the daily report, to Southland; (x) Southland furnished the applicants with a weekly list or booklet of suggested retail prices but the applicants sometimes sold their inventory at reduced prices; (xi) the cash register was furnished by Southland and contained taxable and non-taxable keys which were used by the applicants in accordance with a list of taxable items, also furnished to them by Southland; (xii) the applicants (and/or an employee named Charles DeLutri) prepared daily reports (submitted to Southland at the end of each day) which contained, among other things, the day's total receipts (cash and checks), less expenses paid out (presumably to non-program vendors), with adjustments for miscellaneous items, such as, trade coupons, refunds and the like; beginning and ending readings for the cash registers; and a breakdown of receipts into taxable and non-taxable sales; (xiii) the daily receipts were deposited in Citibank to the account of "Seven Eleven Food Store 11459", account no. 12384136-28 and the sales taxes collected were transmitted to Southland; (xiv) the applicants received a total weekly salary or draw of \$200.00, which, like other payroll, constituted a charge against the applicants; (xv) the applicants hired all other employees and fixed wages, but gross payroll could not exceed eight (8%) percent of gross sales or the applicants would either not receive their weekly draw or an amount sufficient to meet the excess payroll would be withdrawn from the balance of their Net Worth; (xvi) Southland also provided

the employees with W-2 forms and deducted and paid over to the proper taxing authorities all FICA, withholding and unemployment taxes; (xvii) all employees were paid directly by Southland on a weekly basis with checks drawn upon the aforesaid Citibank account and signed by an agent of Southland, all based upon periodic reports stating each employee's total hours worked and hourly rate which were prepared by the applicants and submitted to Southland; (xviii) Southland would prepare and furnish to the applicants a quarterly statement which would (for the period covered) set forth, among other things, the total charges to the applicants, the monies collected by the applicants and transmitted to Southland, and an appropriate increase or decrease in the applicants' Net Worth, dependent upon a showing of "profit" or "loss"; (xix) Southland maintained all books and records with regard to the applicants' store and prepared and filed all tax returns, paying the taxes due and owing directly to the proper taxing authorities; and (xx) the applicants did not have authority to issue and/or sign checks against the aforesaid Citibank account, did not, in fact, sign any checks for purposes of payroll or otherwise, and did not maintain a checking account in the partnership name.

8. During the period in question, applicant Michael Del Grasso had a full-time job elsewhere but, when not so employed, spent up to twelve hours per day in the store, as did his wife, applicant Jean Del Grasso. Applicant Michael Del Grasso directed and supervised the store employees and ordered food and other supplies. While not previously in the retail store business, applicant Michael Del Grasso was familiar with the store operations and aware of the necessity of collecting and remitting New York City and State sales taxes.

9. Applicants ceased doing business in or about March, 1976, failing to recover their initial capital investment, and merely surrendered the store to Southland.

10. The auditor for the Audit Division visited the applicants' place of business, and for the test period of April, 1974, examined the general ledger, purchase invoices, New York State sales tax returns and Federal income tax returns, all for the periods ended March 31, 1973 through February 28, 1976.

11. In or about February, 1977, a field audit report was filed, claiming a deficiency in sales and use taxes against the applicants in the amount of \$36,429.16, plus interest and penalty.

12. The applicants contested the claimed deficiency on the following grounds: (a) the Audit Division utilized a ratio of 43.5% of purchases as taxable, which "taxable ratio" was improper and highly inflated; (b) sales of non-taxable items were improperly computed in that the greatest percentage of items purchased (and sold) by the applicants' store were of non-taxable items, such as milk and other dairy products, cold cuts, bread, cake, canned and frozen goods, potato chips, butter and the like; (c) the nature and location of the applicants' business were not considered; (d) a "markup" percentage of 63.9% was arbitrary and unduly high; (e) the one-month sample or test period was neither sufficient nor representative; (f) the allowance for pilferage and shortages was not considered or, if considered, was inadequate; (g) the allowance for waste and spoilage was not considered or, if considered, was inadequate; (h) the dollar amount of "taxable purchases" was inflated; (i) the tax on the sale of cigarettes was improperly computed; and (j) the "average" tax rate of .0764% as applied by the Audit Division was improper and excessive.

13. The books and records maintained by applicants and Southland, which were readily accessible to the Audit Division, were adequate for the Audit Division to determine the exact tax liability of applicants.

CONCLUSIONS OF LAW

A. That the applicants, Michael and Jean Del Grasso, d/b/a 7-11 Store No. 11459, constituted a vendor as defined in section 1101(b) (8) of the Tax Law and were subject to the sales and use taxes imposed by Articles 28 and 29 of the Tax Law.

B. That said applicants were persons required to collect sales and use taxes within the meaning and intent of section 1131(1) of the Tax Law and were personally liable for the collection and payment of same within the meaning and intent of section 1133(a) of the Tax Law.

C. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

D. That the applicants maintained adequate books and records from which the actual tax could have been determined. That, therefore, the Audit Division's resort to the use of a test period is incorrect.

E. That the application of Michael and Jean DelGrasso is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 18, 1977 is cancelled.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION

James H. Tully
PRESIDENT

Thomas H. [unclear]
COMMISSIONER

Francis R. Koenig
COMMISSIONER