

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Evia Diners, Inc. (Seller) :

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 3/1/73-1/24/75. :

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 27th day of February, 1981, he served the within notice of Decision by mail upon Evia Diners, Inc. (Seller), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Evia Diners, Inc. (Seller)  
407 Jericho Tpk.  
Syosset, NY 11791

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  
27th day of February, 1981.

*Cornie A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Evia Diners, Inc. (Seller) :

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 3/1/73-1/24/75. :

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 27th day of February, 1981, he served the within notice of Decision by mail upon George Misthos 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. George Misthos  
32-15 Broadway  
Long Island City, NY 11106

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  
27th day of February, 1981.

*Ernie A. Hugeland*

*J. Vredenburg*

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

February 27, 1981

Evia Diners, Inc. (Seller)  
407 Jericho Tpk.  
Syosset, NY 11791

Gentlemen:

Please take notice of the Decision 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  
George Misthos  
32-15 Broadway  
Long Island City, NY 11106  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
EVIA DINERS, INC. (SELLER)	:	DECISION
	:	
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 January 24,	:	
1975.	:	

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Petitioner, Evia Diners, Inc., 407 Jericho Turnpike, Syosset, New York 11791, filed a petition 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 January 24, 1975 (File No. 15080).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 14, 1979 at 1:15 P.M. Petitioner appeared by George Misthos, Public Accountant. The Audit Division appeared by Peter Crotty, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioner is liable for additional sales taxes asserted pursuant to audit for the period March 1, 1973 through January 24, 1975.

II. Whether petitioner is liable for sales tax upon the sale of tangible personal property employed in the business upon the sale of said business.

FINDINGS OF FACT

1. On April 29, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Evia Diners, Inc., stating:

"As a result of an audit, the following taxes are determined to be due in accordance with the provisions of Section 1138 of the Sales Tax Law.

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty &amp; Interest</u>	<u>Total</u>
5/31/73	\$ 4,024.99	\$ 1,569.75	\$ 5,594.74
8/31/73	5,222.48	1,880.09	7,102.57
11/30/73	4,719.01	2,548.27	7,267.28
2/28/74	8,901.86	4,539.95	13,441.81
5/31/74	5,299.18	3,155.95	8,455.13
8/31/74	4,984.36	2,193.12	7,177.48
11/20/74	9,841.53	3,739.78	13,581.31
1/24/75	5,740.90	1,837.09	7,577.99
Bulk Sale	25,550.00	8,176.00	33,726.00
Total	\$74,284.31	\$29,640.00	\$103,924.31"

2. During the period under review petitioner was engaged in the business of operating a diner, situated on a leasehold located at 407 Jericho Turnpike. The land was leased on April 3, 1972 by Glickman Syosset Company as lessor, to Tom Papageorge, (who was the president of Evia Diners, Inc.), as lessee. Clauses eight (8) and forty-one (41) of the lease provided:

"8. The lessor agrees that the diner restaurant to be constructed by the lessee at his own cost and expense shall not become part of the realty but rather shall remain personal property throughout the term of this lease. However, the foundation itself shall attach to the realty and become part of the same."

"41. At the expiration of this lease, the lessee shall return the demised premises to the lessor vacant, clean and level. The lessee shall remove and fill in the foundation, the diner restaurant and any and all poles and stachions used to hold signs, lights, etc. The cost and expense for this removal shall be borne entirely by the lessee."

3. The diner business was started on March 1, 1973. The business was sold on January 24, 1975. The sale price of the business was \$380,000.00 which included the leasehold, diner, furniture, fixtures, inventory and goodwill. The diner was valued by petitioner at \$125,000.00, furniture and fixtures were valued at \$35,000.00 and the inventory at \$15,000.00 to \$20,000.00. Sales tax of \$1,050.00 was paid on the furniture and fixtures.

4. The diner, a prefabricated unit, was purchased by Evia Diners, Inc. from De Raffele Mfg. Co., Inc. on April 27, 1972 for \$166,355.00 plus sales tax of \$11,645.00. The moving charge was \$12,000.00.

5. An audit was made of petitioner's sales tax returns, Federal income tax returns, cash receipts books, cash disbursement book and accountant's worksheets. It was found that for the period March 1, 1973 to September 30, 1973, gross sales on sales tax returns were based on estimated weekly receipts and were approximately \$100,000.00 less than reported on petitioner's Federal income tax return and gross sales per petitioner's books were \$39,643.16 less than reported on the Federal income tax return.

6. The books and records maintained by petitioner were insufficient for the determination of the exact amount of taxable sales for the period March 1, 1973 through August 31, 1974. In order to determine the audited taxable sales for said period, the auditor used the purchase markup method. The amount of average monthly audited sales for the period was used. Petitioner did not provide menus or price lists to determine markup percentages. Based upon the auditor's experience, he applied a markup of 150 percent for food, 275 percent for liquor and 200 percent for beer. This resulted in audited taxable sales of \$843,560.17 for the period. Because there were no records of purchases from September 1, 1974 to January 24, 1975, audited taxable sales were projected based on the average audited taxable sales determined for the prior eighteen months. This amounted to \$222,606.14. Total audited taxable sales for March 1, 1973 to January 24, 1974 were therefore \$1,066,166.31 (\$843,560.17 + \$222,606.14). Taxable sales reported were \$430,695.54, leaving a balance of \$635,470.77 additional taxable sales. The sales price of the diner (\$380,000.00) was considered fully taxable. The tax on the diner, after deducting tax of \$1,050.00 paid thereon, was computed at \$25,550.00. This amount plus the tax on additional

taxable sales (\$48,734.31) resulted in the \$74,284.31 taxes assessed against petitioner.

7. At a pre-hearing conference, the auditor presented additional schedules to correct arithmetical errors and to acknowledge some adjustments based on additional substantiation supplied by the petitioner subsequent to the issuance of the notice of determination. The audited taxable sales were recomputed as the result of an adjustment made for a \$20.00 per day food allowance to employees. Total for the period was \$11,400.00. A sales tax return for the period January 1, 1975 to February 28, 1975 filed by the purchaser was found to have been filed. No sales tax return for the period December 1, 1974 to December 31, 1974 was filed. Total corrected additional taxable sales were recomputed to be \$442,885.71 (total audited taxable sales \$945,886.65 less reported taxable sales \$503,000.94). Tax due at 7 percent was calculated to be \$31,002.02 (computed tax due is \$66,212.07 less tax paid \$35,210.05).

8. Petitioner offered no documentary or other evidence that the computation for total audited taxable sales, as revised, was incorrect.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

Therefore, the Audit Division's determination of additional taxes due was determined from such information as was available in accordance with the meaning and intent of section 1138(a) of the Tax Law.

B. That section 1105 of the Tax Law provides in part:

"...there is hereby imposed and there shall be paid a tax...upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1101(b)(4) of the Tax Law defines retail sale as including:

"(i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property,...."

Section 1101(b)(6) of the Tax Law defines tangible personal property as "Corporeal personal property of any nature."

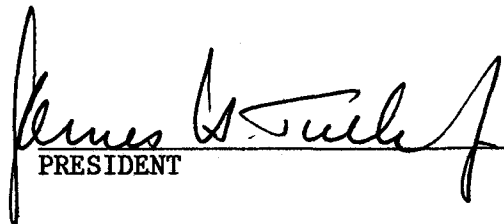
Therefore, pursuant to section 1105(a) of the Tax Law, petitioner's bulk sale of the business assets, comprised of the diner and furniture and fixtures, were subject to taxation. The tax due thereon amounts to \$10,150.00.

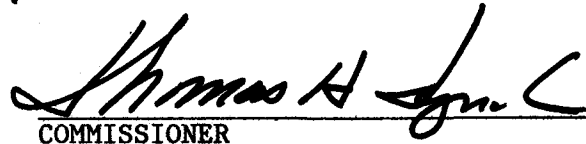
C. That the petition of Evia Diners, Inc. is granted to the extent indicated in Finding of Fact "7" and Conclusion of Law "B" above; that the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 29, 1976 to reflect taxes due in the amount of \$41,152.02. That, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 27 1981

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER