

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Fotos Restaurant Corp. :

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:
12/1/68-11/30/71.

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 November, 1981, he served the within notice of Decision by certified mail upon Fotos Restaurant Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fotos Restaurant Corp.
419 Oriskany Blvd.
Yorkville, NY 13495

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 November, 1981.

James G. DeGard

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Fotos Restaurant Corp. :
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 12/1/68 - 11/30/71.

State of New York
County of Albany

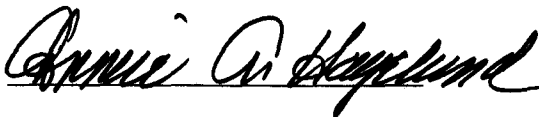
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon James C. Oster the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

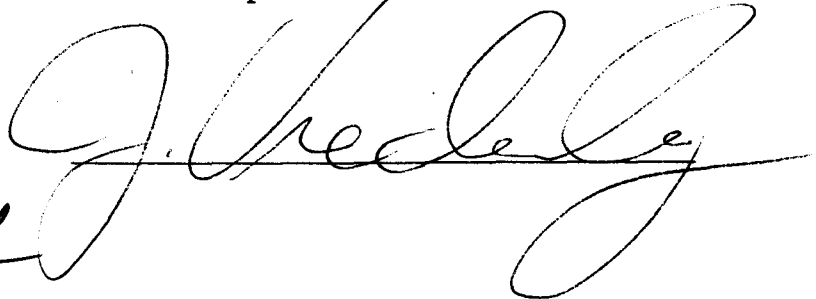
James C. Oster
Hughes, Groben, Liddy, Cardamone & Gilroy
First Nat'l. Bank Bldg., P.O. Box 423
Utica, NY 13503

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 November, 1981.


James C. Oster



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

November 27, 1981

Fotos Restaurant Corp.
419 Oriskany Blvd.
Yorkville, NY 13495

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
James C. Oster
Hughes, Groben, Liddy, Cardamone & Gilroy
First Nat'l. Bank Bldg., P.O. Box 423
Utica, NY 13503
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FOTOS RESTAURANT CORP.	:	
and JAMES FOTOS, IRENE FOTOS	:	DECISION
and CHARLES ZARKER,	:	
Individually and as Officers	:	
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 December 1,	:	
1968 through November 30, 1971.	:	

Petitioners, Fotos Restaurant Corp. and James Fotos, Irene Fotos and Charles Zarker, individually and as officers, 419 Oriskany Boulevard, Yorkville, New York 13495, 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 December 1, 1968 through November 30, 1971 (File No. 01599).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Utica, New York, on July 20, 1976 at 9:15 A.M. Petitioners appeared by Hughes, Groben, Liddy, Cardamone and Gilroy (James C. Oster, Esq. and John M. Liddy, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Richard M. Kaufman, Esq., of counsel).

ISSUES

I. Whether petitioners are liable for New York State sales and use taxes on the purchase of paper products used in their business.

II. Whether petitioners are liable for New York State sales tax on sales of soda and noncarbonated beverages.

III. Whether petitioner Irene Fotos was a person required to collect tax, within the meaning of section 1131(1) of the Tax Law.

FINDINGS OF FACT

1. On July 6, 1972, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioners, Fotos Restaurant Corp. and James Fotos, Irene Fotos and Charles Zarker, individually and as officers, in the amount of \$6,324.32, plus penalty and interest of \$1,690.34, for a total of \$8,014.66.

2. Petitioner Fotos Restaurant Corp. operated a "McDonald's" restaurant under a franchise agreement. It sold food, carbonated and noncarbonated soft drinks, coffee, milk and chocolate drink. Said petitioner did not collect sales tax on any sales made during the period December 1, 1968 through June 30, 1971.

3. Sandwiches sold by petitioner Fotos Restaurant Corp. were served in paper wrappings and boxes; french fries were served in paper containers; and drinks were dispensed in paper cups. The aforementioned paper products, which represented ninety percent of the paper products purchased by said petitioner, were transferred to its customers with the sale of food and drink. Said petitioner did not pay sales or use tax on the purchases of said paper products.

4. In connection with the sale of food and drink, petitioner Fotos Restaurant Corp. provided its customers with napkins, straws and stirrer sticks. No sales or use tax was paid on the purchase of said accessories by the petitioner.

5. The assessment was based on unreported sales of sodas and noncarbonated beverages during the period December 1, 1968 through June 30, 1971, and on the

purchases of paper products as shown on the books and records of petitioner Fotos Restaurant Corp.

6. Although petitioner Irene Fotos was the Secretary of Fotos Restaurant Corp., she held this office in name only and did not take an active role in the business.

7. Petitioner Fotos Restaurant Corp. cooperated with the Audit Division and acted on the advice of its accountant.

CONCLUSIONS OF LAW

A. That the paper cups, food wrappings, etc., which represented 90 percent of paper products purchased by petitioner Fotos Restaurant Corp. were purchased "for resale as such" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law. Accordingly, the purchases thereof by petitioner were exempt from sales or use taxes. (Matter of Burger King, Inc. v. State Tax Commission, 51 N.Y.2d 614.)

B. That the remaining 10 percent of paper products purchased by petitioner Fotos Restaurant Corp. consisting of accessories such as napkins, straws and stirrers were not purchased for resale within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law. Petitioner's customers did not purchase the accessories as such or as a physical component part of tangible personal property, but received them only as an incident to the purchase of food and drink. Therefor, the purchases thereof by petitioner were subject to the use tax imposed by section 1110 of the Tax Law.

C. That since the sale of soft drinks, sodas and beverages other than coffee, tea and cocoa were not exempt from tax under section 1115(a)(1) of the Tax Law, the sales by petitioner Fotos Restaurant Corp. of such drinks, sodas and beverages were subject to tax under section 1105(a) of the Tax Law. That

under section 1133(a) of the Tax Law, every person required to collect tax is personally liable for the tax imposed, collected or required to be collected.

D. That petitioner Irene Fotos was not a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law; rather that petitioners Fotos Restaurant Corp., James Fotos and Charles Zarker are persons required to collect tax, within the meaning and intent of section 1131(1) of the Tax Law.

E. That the petition of Fotos Restaurant Corp. and James Fotos, Charles Zarker and Irene Fotos, individually and as officers, is granted to the extent that the assessment against Irene Fotos is cancelled; that the assessment for 90 percent of paper products purchased is cancelled; and that the penalty and interest in excess of the minimum statutory rate are cancelled. The Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 6, 1972. Except as so granted, the petition is in all other respects denied.

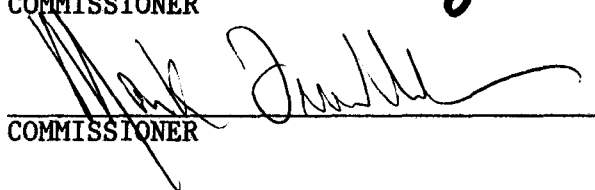
DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

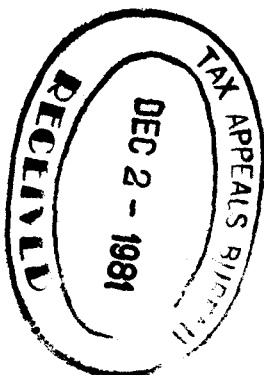

COMMISSIONER

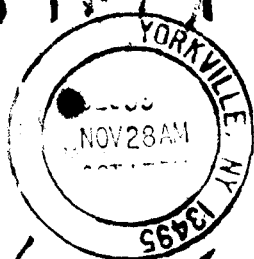
TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

RETURNED TO SENDER
REASON CHECKED
Unclaimed Refused
Addressee unknown X
Insufficient Address
No such street number
No such office in state
Do not remail in this envelope

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Fotos Restaurant Corp.
419 Oriskany Blvd.
Schenectady, NY 13495





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

November 27, 1981

Fotos Restaurant Corp.
419 Oriskany Blvd.
Yorkville, NY 13495

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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
James C. Oster
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Individually and as Officers	:	
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D. That petitioner Irene Fotos was not a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law; rather that petitioners Fotos Restaurant Corp., James Fotos and Charles Zarker are persons required to collect tax, within the meaning and intent of section 1131(1) of the Tax Law.

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DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


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COMMISSIONER