

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gabriel Guardarramas :
d/b/a El Radiante Restaurant :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales Tax under :
Article 28 & 29 of the Tax Law for the Period :
6/1/69 - 5/31/72.

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 21st day of August, 1981, he served the within notice of Decision by certified mail upon Gabriel Guardarramas, d/b/a El Radiante Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gabriel Guardarramas
d/b/a El Radiante Restaurant
4175 Murdock Ave.
Bronx, NY 10466

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
21st day of August, 1981.

Annie A. Hagelund

J. Vredenburg

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

August 21, 1981

Gabriel Guardarramas
d/b/a El Radiante Restaurant
4175 Murdock Ave.
Bronx, NY 10466

Dear Mr. Guardarramas:

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

,
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Gabriel Guardarramas
d/b/a El Radiante Restaurant

:
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: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales Tax under :
Article 28 & 29 of the Tax Law for the Period :
6/1/69 - 5/31/72.

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 August, 1981, he served the within notice of Decision by mail upon Gabriel Guardarramas, d/b/a El Radiante Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gabriel Guardarramas
d/b/a El Radiante Restaurant
4175 Murdock Ave.
Bronx, NY 10466

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 August, 1981.

James A. Haglund

J. Vredenburg

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

August 14, 1981

Gabriel Guardarramas
d/b/a El Radiante Restaurant
4175 Murdock Ave.
Bronx, NY 10466

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

GABRIEL GUARDARRAMAS
D/B/A EL RADIANTE RESTAURANT

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 June 1, 1969 :
through July 31, 1973.

Petitioner, Gabriel Guardarramas d/b/a El Radiante Restaurant, 4175 Murdock Avenue, Bronx, New York 10466, 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 June 1, 1969 through July 31, 1973 (File No. 16469).

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 January 12, 1979 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division accurately determined petitioner's sales tax liability for the period June 1, 1969 through July 31, 1973.

II. Whether the Audit Division properly valued petitioner's business assets which were transferred to the purchaser.

FINDINGS OF FACT

1. Petitioner, Gabriel Guardarramas d/b/a El Radiante Restaurant, operated a restaurant at 640 Prospect Avenue, Bronx, New York, selling food, beer and liquor. The business was sold on July 31, 1973.

2. On March 14, 1975, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner imposing additional sales tax due of \$7,908.04, plus penalty and interest, for the period June 1, 1969 through May 31, 1972. On April 6, 1976, the Audit Division issued a second Notice against the petitioner imposing sales tax due of \$547.47, plus penalty and interest. The tax was imposed on the grounds that the business assets sold on July 31, 1973 constituted a taxable sale and that petitioner failed to collect the tax.

3. On audit, the Audit Division performed markup tests for the month of April, 1973 on beer and liquor and arrived at markups of 186 percent and 283 percent, respectively. The Division used petitioner's reported markup of 108 percent for food. It applied the markup percentages to the purchases for each category to arrive at audited gross sales. These audited gross sales for the audit period were 5.7 percent higher than the sales reported on the sales tax returns. The Division then examined guest checks for a six-day period (February 14-19, 1973), to determine what portion of the sales were under \$1.00. This procedure was used because meals sold for under \$1.00 were not taxable prior to July 1, 1971. Based on the review of guest checks, the Audit Division determined that 92 percent of food sales were \$1.00 or more and therefore taxable. This audit procedure resulted in additional tax due of \$7,908.04.

4. In arriving at the tax due regarding the bulk sale, the Audit Division used the book value of the fixed asset account less the accumulated depreciation which equaled \$7,821.00.

5. Petitioner's vast majority of its sales prior to July 1, 1971 were under \$1.00. Petitioner had sufficient records including guest checks and cash

register tapes which he turned over to the Audit Division, but the records were not returned to him after the audit.

6. Petitioner did not produce any evidence to show that the valuation of assets by the Audit Division to determine the tax due on the bulk sale of such assets was erroneous.

7. The Audit Division failed to establish that petitioner's records were insufficient to determine the exact amount of sales made at \$1.00 or more.

8. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That the examination by the Audit Division of petitioner's guest checks and the application of the results of that examination to the period June 1, 1969 through June 30, 1971 did not lend consideration to the selling prices in effect during the June 1, 1969 through June 30, 1971 period. Moreover, there is no evidence to show that petitioner failed to maintain guest checks and register tapes for the period June 1, 1969 through June 30, 1971 which would prohibit an examination of such records by the Audit Division. Therefore, the examination of the petitioners' guest checks and the resultant findings (which determined that 92 percent of petitioner's food sales were \$1.00 or more) did not accurately reflect petitioner's additional sales tax liability.

B. That the additional tax due on the Notice of Determination issued March 14, 1975 was attributable to the test of guest checks described in Finding of Fact "3" and Conclusion of Law "A" herein. Accordingly, the additional tax due in the sum of \$7,908.04 is cancelled.

C. That the Audit Division has properly determined the value of petitioner's business assets which were transferred to the purchaser of his business.

D. That the petition of Gabriel Guardarramas d/b/a El Radiante Restaurant is granted to the extent of cancelling in full the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 14, 1975; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 6, 1976 for tax due of \$547.47 is sustained; that such tax due shall be together with interest at the minimum statutory rate and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER