

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Grow Lunch, Inc. :
and Oscar Kimmeldorf, Individ. & as 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 :
12/1/72 through 5/31/76. :

State of New York
County of Albany

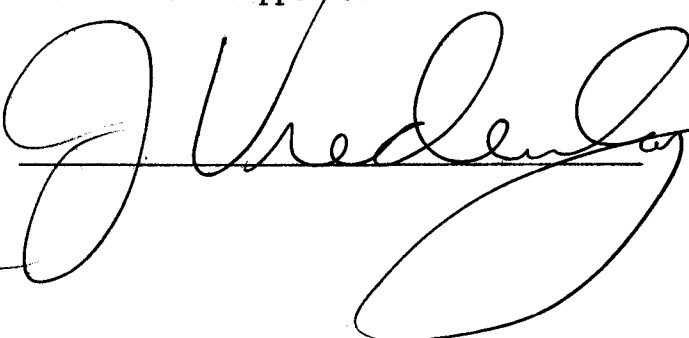
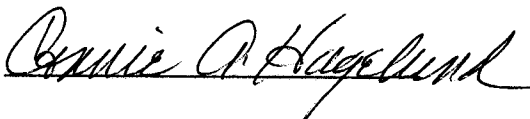
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Grow Lunch, Inc., and Oscar Kimmeldorf, Individ. & as officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Grow Lunch, Inc.
and Oscar Kimmeldorf, Individ. & as officer
2154 8th Ave.
New York, NY 10026

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
2nd day of October, 1981.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Grow Lunch, Inc. :
and Oscar Kimmeldorf, Individ. & as 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 12/1/72 through 5/31/76. :

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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Irving Kimmeldorf the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irving Kimmeldorf
43 Amberson Ave.
Yonkers, 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 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
2nd day of October, 1981.

Bernie A. Hageman

J. Vredenburg

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

October 2, 1981

Grow Lunch, Inc.
and Oscar Kimmeldorf, Individ. & as officer
2154 8th Ave.
New York, NY 10026

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,
Kathy Pfaffenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
Irving Kimmeldorf
43 Amberson Ave.
Yonkers, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
GROW LUNCH, INC. and
OSCAR KIMMELDORF, 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 December 1, 1972 through
May 31, 1976.

DECISION

Petitioners, Grow Lunch, Inc. and Oscar Kimmeldorf, individually and as an officer, 2154 8th Avenue, New York, New York 10026, 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, 1972 through May 31, 1976 (File No. 16992).

A formal hearing was held before Melvin S. Barasch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on July 14, 1978. Petitioners appeared by Irving Kimmeldorf, CPA. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the audit of the vendor's books and records and the resulting findings were proper and correct.

FINDINGS OF FACT

1. On March 14, 1976, petitioner Grow Lunch, Inc., a registered vendor, executed a consent extending the period of limitation within which to issue an assessment under Articles 28 and 29 of the Tax Law for the taxable period December 1, 1972 through August 31, 1975, to December 20, 1976.

2. On September 24, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Grow Lunch, Inc. and Oscar Kimmeldorf, individually and as officer, for the period December 1, 1972 through May 31, 1976 in the amount of \$13,921.98, plus penalty and interest of \$5,328.32, for a total of \$19,250.30. Petitioners timely filed a petition for revision of the notice of determination.

3. The determination was based on a field audit of the books and records of petitioner Grow Lunch, Inc., operator of a bar and grill located at 8th Avenue and 116th Street, New York, New York. Petitioner Oscar Kimmeldorf, is the sole officer.

4. On audit, the Audit Division performed mark-up tests for liquor and beer using purchase invoices and selling prices for November, 1975. The test disclosed a combined liquor and wine mark-up of 182.8 percent and beer mark-up of 131.11 percent. A food markup of 100 percent was estimated.

5. After a conference with petitioners, the Audit Division revised the liquor-wine markup to 142.28 percent. It then applied the markups to purchases petitioner made in the audit period which resulted in additional taxable sales of \$183,250.00 and tax due thereon of \$13,921.98.

6. The Audit Division considered that most drinks were sold two for one. They allowed 1 1/8 ounce of liquor per serving. Fifteen percent was allowed for spillage except for beer which petitioner sold by the bottle only. There was no credit allowed for free or courtesy drinks or drinks by bartenders since petitioner failed to present proof of the amount of such drinks.

7. At the hearing, petitioners pointed out two errors made on the Audit Division's workpapers which reduce to 138.79 percent the liquor-wine markup.

No other substantial evidence was offered to show that the Audit Division erred in making its determination.

8. Petitioner Grow Lunch, Inc.'s. Books and records were inadequate for the Audit Division to determine the exact amount of sales tax due.

9. Petitioner did not wilfully attempt to evade the tax.

CONCLUSIONS OF LAW

A. That since petitioner Grow Lunch, Inc.'s record keeping was insufficient, the audit procedures and tests adopted by the Audit Division to determine the vendor's taxable sales and sales tax due were proper pursuant to section 1138(a) of the Tax Law (Matter of Chartair Inc. v. State Tax Commission, 65 A.D.2d 44).

B. That except for the liquor and wine markup which shall be reduced to 138.79 percent pursuant to Finding of Fact "7", the petitioners have failed to sustain the burden of showing error. (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

C. That the Audit Division is directed to modify and recompute the determination in accordance with Conclusion of Law "B", together with interest computed at the minimum statutory rate.

D. That the petition of Grow Lunch, Inc. and Oscar Kimmeldorf is granted in accordance with Conclusion of Law "B" and "C" and is in all other respects denied.

DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION

James H. Tully
PRESIDENT

Franz R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER