

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Java Caterers, Inc.

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:  
12/1/71 - 11/30/76.

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Java Caterers, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

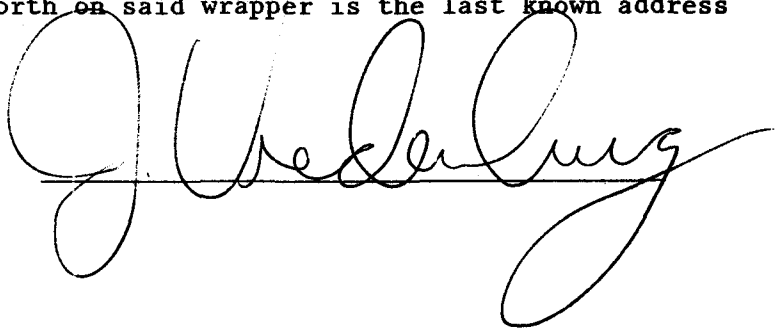
Java Caterers, Inc.  
473 Bayview Ave.  
Inwood, NY 11696

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.





STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Java Caterers, Inc. :  
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 12/1/71 - 11/30/76. :

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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 Abraham Breitbart the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

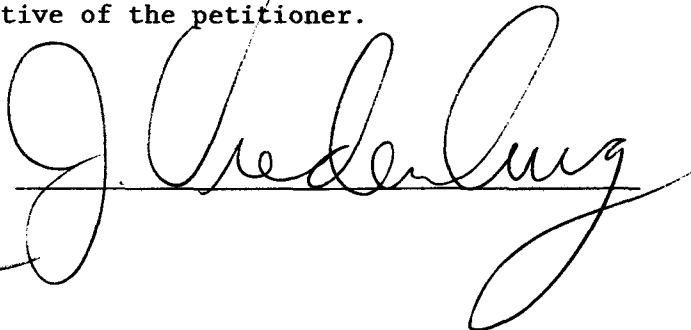
Abraham Breitbart  
Tell, Chesler, Breitbart & Lefkowitz  
116 John St.  
New York, NY 10038

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.





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

November 27, 1981

Java Caterers, Inc.  
473 Bayview Ave.  
Inwood, NY 11696

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  
Abraham Breitbart  
Tell, Chesler, Breitbart & Lefkowitz  
116 John St.  
New York, NY 10038  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
JAVA CATERERS, INC. : DECISION  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 & 29 :  
of the Tax Law for the Period December 1, 1971 :  
through November 30, 1976.

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Petitioner, Java Caterers, Inc., 473 Bayview Avenue, Inwood, New York 11696, 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, 1971 through November 30, 1976 (File No. 19803).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 22, 1980 at 10:45 A.M. and continued on March 21, 1980 at 9:15 A.M., April 21, 1980 at 1:15 P.M. and July 16, 1980 at 9:15 A.M. Petitioner appeared by Abraham Breitbart, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUES

I. Whether petitioner waived its right to a hearing as provided in section 1138(a) of the Tax Law by consenting to the fixing of tax in accordance with the provisions of section 1138(c) of the Tax Law.

II. Whether certain equipment rented by petitioner was for resale within the meaning and intent of section 1101(b)(4) of the Tax Law.

III. Whether the Audit Division properly used a test period as a basis for determining petitioner's sales and use tax liability for the period December 1, 1971 through November 30, 1976.

FINDINGS OF FACT

1. Petitioner, Java Caterers, Inc., is a caterer who prepares food and drink and furnishes waitress or waiter service. Petitioner caters affairs at personal residences, churches and temples.

2. On June 20, 1977, 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 petitioner for the period December 1, 1971 through November 30, 1976 for taxes due of \$19,664.15, plus penalty and interest of \$9,173.23, for a total of \$28,837.38.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1971 through November 30, 1974 to June 20, 1977.

4. On audit, the Audit Division compared gross sales per books with gross sales reported on sales tax returns and found that due to a mathematical error in the return filed for the period ending August 31, 1972, gross sales and taxable sales were understated by \$13,886.25 and \$5,528.00, respectively. The Division analyzed petitioner's reported nontaxable sales for the months of September 1975 and October 1975 and disallowed 15.03 percent. Such sales were charges for extra waitresses. The percentage of disallowance was applied to nontaxable sales reported for the audit period of \$181,171.00 to determine total disallowed nontaxable sales of \$27,229.85. This amount was combined with the unreported taxable sales of \$5,528.00 to arrive at additional taxable sales of \$32,757.85 and tax due thereon of \$2,280.73.

An examination of purchase invoices for the month of October 1975 disclosed that petitioner failed to pay a sales or use tax on certain purchases of supplies (china and silverware), linens, repairs and on the rentals of tables,

chairs and bars. Taxable purchases of supplies, repairs and linens totaled \$2,497.10 and equipment rentals amounted to \$3,962.48. Said amounts were related to gross sales for the same month to determine error rates of 3.71 percent and 5.89 percent, respectively. These error rates were applied to gross sales for the audit period of \$2,949,891.98 to arrive at taxable supply purchases of \$109,441.03 and equipment rentals of \$173,748.58 with total taxes due thereon of \$19,664.15.

The Audit Division did not base its error rates on purchases because records for fourteen months were missing from petitioner's cash disbursements journal.

Petitioner did not retain copies of sales invoices for sales made during the audit period.

5. On March 17, 1977, petitioner signed a Consent to Fixing of Tax Not Previously Determined and Assessed whereby it agreed to taxes due of \$2,280.73, plus interest of \$451.16, for a total of \$2,731.89 for the period December 1, 1971 through November 30, 1976. Said amount represents the taxes determined due on charges for extra waitresses and unreported taxable sales as set forth in Finding of Fact "4". However, at the hearing, petitioner contended it was under the impression that the consent included tax on the purchases of china and silverware as well as the charges for extra waitresses.

6. During the period at issue, petitioner rented equipment such as tables, chairs and bars from Famous Party Suppliers, Inc. The equipment was delivered by the vendor directly to the location where the catered affair was to be held. Petitioner used the equipment in performing its catering services and such equipment was picked up by the vendor the following day. Petitioner argued that it did not take actual or constructive possession of the equipment

nor did it have control over the use thereof and thus concluded it was not the consumer of the equipment. Petitioner went on to argue that its total charge to customers for catering services reflects a charge for equipment and since sales tax is collected on the total charge, it has collected the tax from the customer on the equipment rentals.

7. Petitioner's sales invoices to customers did not show a separate amount for equipment; however, such expense was considered by petitioner in determining its total price to the customer.

8. With respect to audit procedures, petitioner contended that a test period of one month (October 1975) was not sufficient nor a reasonable basis on which to determine taxes due for a sixty month period.

Notwithstanding the foregoing contention, petitioner argued that there is no relationship between its purchases of supplies and rentals and its gross sales. Petitioner further argued that a margin of error based on untaxed purchases as compared to total purchases would achieve a more accurate result. The sales tax auditor testified that such a method would have been utilized had petitioner's purchase records been complete.

9. At the hearing, petitioner introduced documents purporting to be its cash disbursements journal for the months of August 1973 through November 1973, May 1974, August 1974, October 1974, December 1974, January 1975, November 1975 and February 1976 which constituted eleven of the fourteen missing months. On said documents the year has been changed so as to conform with the missing months indicated by the Audit Division. The cash disbursements journal monthly totals reported on many of the introduced documents are identical to total cash disbursements made during other months in the audit period.

10. Petitioner offered no substantial evidence to show that the additional tax due on disallowed nontaxable sales and unreported taxable sales was not correct.

11. Petitioner failed to establish that a reasonable cause existed for the cancellation of penalty and interest in excess of the minimum statutory rate.

12. Due to altered documents presented at the hearing, this matter was referred to the New York State Attorney General's Office and an indictment was obtained against Milton Rothman, petitioner's accountant. On July 21, 1981, Mr. Rothman pled guilty to perjury.

#### CONCLUSIONS OF LAW

A. That petitioner, by executing the consent referred to in Finding of Fact "5", finally and irrevocably fixed the tax shown thereon in accordance with the provisions of section 1138(c) of the Tax Law and thereby waived its right to a hearing as provided in section 1138(a) of the Tax Law. Accordingly, the correctness of the taxes determined with respect thereto are not addressed herein. Petitioner's remedy under the foregoing circumstances was to apply for a credit or refund pursuant to section 1139(c) of the Tax Law.

B. That petitioner did not rent equipment for the purpose of "resale" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law; that said equipment is used by petitioner in performing catering services and that the inclusion of the cost of such rentals in its charge for catering services does not constitute a "sale" within the meaning and intent of section 1101(b)(5) of the Tax Law; therefore, the rental of equipment by petitioner is subject to tax imposed under section 1105(a) of the Tax Law and petitioner is accordingly liable for such taxes pursuant to section 1133(b) of the Tax Law.

C. That since petitioner's books and records were incomplete, the Audit Division could not determine the exact amount of tax due on purchases of

supplies and rentals. That the use of a test period to determine petitioner's taxable purchases for the period December 1, 1971 through November 30, 1976 was proper in accordance with the provisions of section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission 65 AD 2d 44). Moreover the records introduced into evidence at the hearing (Finding of Fact "9") were altered documents. That such alteration vitiates the credibility of petitioner's records for the period in issue.

D. That the petition of Java Caterers, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1977 is sustained together with full penalty and interest authorized under section 1145(a)(1) of the Tax Law.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER