

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
La Cascade, 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 12/1/73-11/30/76. :

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 20th day of February, 1981, he served the within notice of Decision by mail upon La Cascade, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

La Cascade, Inc.
Rt. 32A
Haines Falls, NY 12436

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
20th day of February, 1981.

Cornie A. Hagelund

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION

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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 20th day of February, 1981, he served the within notice of Decision by mail upon Alexander Varga 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. Alexander Varga
389 Main St.
Catskill, NY 12414

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
20th day of February, 1981.

Ernest A. Haglund

J. Vredenburg

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

February 20, 1981

La Cascade, Inc.
Rt. 32A
Haines Falls, NY 12436

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
Alexander Varga
389 Main St.
Catskill, NY 12414
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LaCASCADE, INC.	:	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 December 1, 1973 through	:	
November 30, 1976.	:	

Petitioner, LaCascade, Inc., Rt. 32A, Haines Falls, New York, 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, 1973 through November 30, 1976 (File No. 21621).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on February 21, 1980 at 1:00 P.M. Petitioner appeared by Alexander Varga, CPA and Robert V. Ferrari, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUE

Whether the entire "package rate" which includes meals, lodging, horseback riding, transportation, taxes and service charge is subject to tax where such charges are not separately stated on the customer's invoice.

FINDINGS OF FACT

1. On December 1, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against LaCascade, Inc. for the period December 1, 1973 through November 30, 1976 in the amount of \$13,047.84 tax, plus penalties and interest. The Notice was issued as a result of a field audit.

2. Petitioner executed a consent extending the period of limitation for assessment to December 20, 1977.

3. Petitioner operated a resort ranch in the Catskill Mountains. Petitioner offered group rates in its brochures. Group rates were advertised as including room, board, horseback riding, round trip transportation from New York City, transportation to and from Hunter Mountain Ski Bowl, taxes and service charge.

4. On audit, the Audit Division found that records were not available for the period December 1, 1973 through April 30, 1975. It therefore estimated gross sales for that period using the average monthly sales for May 1, 1975 through November 30, 1976 and reducing the average by 15 percent to reflect lower prices for the prior period. Audited gross sales of \$830,767.08 were determined for the audit period. The Audit Division accepted nontaxable sales of \$95,191.56 leaving \$726,779.51 subject to tax of \$43,607.97. It was the Audit Division's position that the entire charge billed to petitioner's customers was subject to tax since transportation charges, taxes and gratuities were not separately stated on the invoice given to the customer. Petitioner reported tax of \$30,577.10 on its sales and use tax returns. The difference of \$13,050.87 tax was held due as a result of the audit.

5. Petitioner's invoices to its customers contained a lump-sum charge. No charges were separately stated for transportation, sales tax, service charge or gratuity. Petitioner stamped its invoices with the following statement: "This invoice includes transportation, taxes and 15% service charge."

6. The charges billed petitioner's customers were recorded periodically on its books in accordance with the following formula:

Gross Receipts
Less: Transportation Cost
Net Receipts
divided by 1.15 (15% - gratuity)
Taxable Receipts including tax
divided by 1.06 (6% - sales tax)
Taxable Receipts

Taxable receipts which included only room and board were thus reported on its sales and use tax returns.

The transportation deducted from the gross receipts constituted petitioner's cost of transportation. Petitioner advertised in its brochures free group transportation from New York City area and free coach transportation for school groups from its school to the ranch.

7. Petitioner contended that since it advertised the inclusion of transportation, gratuities and taxes in the package price, these charges should not be subject to tax. It contended that since these brochures were posted on the premises, their obligation was met as to advising the customer of what the charge included. Further, it contended that a separate statement for transportation would be an impracticability since the cost varies per individual depending on the mode of transportation and the number of individuals in a group.

8. Petitioner acted in good faith in that it relied on the advice of its accountant.

CONCLUSIONS OF LAW

A. That section 1132(a) of the Tax Law provides:

"Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him."

That 20 NYCRR 525.6 prohibits the absorption of tax as follows:

"No person required to collect the New York State and local use tax shall fail to collect such tax from the customer upon any transaction where such tax is due. Nor may such person required to collect such tax state, advertise or hold out to any purchaser, to any other person or to the public in general, in any manner, directly or indirectly, that he is not charging the customer the tax, that he will pay the tax, that the tax will not be separately charged and stated to the customer or that the tax will be refunded to the customer."

That petitioner failed to separately state the sales tax on its invoices given its customers as provided by section 1132(a) and 20 NYCRR 525.6.

B. That 20 NYCRR 527.8(1) provides in reference to gratuities and service charges:

"Any charge made to a customer is taxable as a receipt from the sale of food and drink unless:

- (i) the charge is separately stated on the bill or invoice given to the customers; and
- (ii) the charge is specifically designated as a gratuity, and
- (iii) all such monies are paid over in total to employees."

That petitioner failed to specifically designate any amount as a gratuity on its invoices given to customers and to show that such monies were paid over to employees.

C. That transportation is not one of the services enumerated as subject to sales tax by section 1105 of the Tax Law. Petitioner however does not sell the service of transportation but provides "free" transportation, as indicated by its advertisement, to its resort where lodging, food and drink are sold.

D. That petitioner's charges constitute receipts and rents subject to sales tax pursuant to the provisions of section 1105(d) and 1105(e) of the Tax Law.

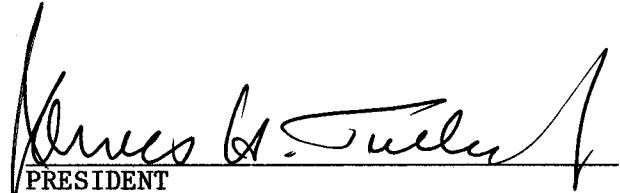
E. That the audit performed by the Audit Division was proper and in accordance with section 1138(a) of the Tax Law.

F. That the penalties and interest in excess of the minimum statutory rate are cancelled.

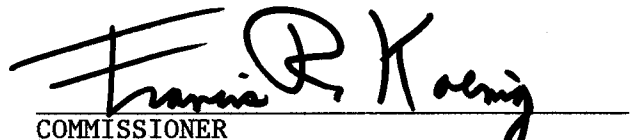
G. That the petition of LaCascade, Inc. is granted to the extent indicated in Conclusion of Law "F"; that the Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 1, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
FEB 20 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER