

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Menrose Caterers, Inc.

:

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales and Use :
Tax under Articles 28 & 29 of the Tax Law :
for the Period 6/1/71-8/31/75.

State of New York
County of Albany

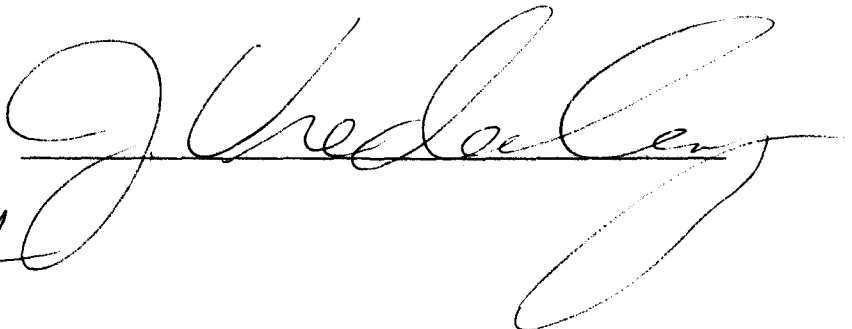
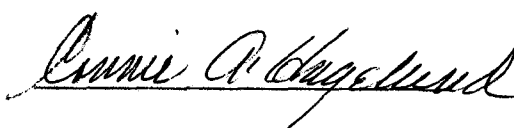
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of May, 1981, he served the within notice of Decision by mail upon Menrose Caterers, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Menrose Caterers, Inc.
5602 11th Ave.
Brooklyn, NY 11219

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
15th day of May, 1981.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Menrose 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 6/1/71-8/31/75.

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 15th day of May, 1981, he served the within notice of Decision by mail upon Max Septimus 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. Max Septimus
Louis J. Septimus & Company
350 Fifth Ave.
New York, NY 10001

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
15th day of May, 1981.

Ernie A. Hagelund

Jay Vredenburg

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

May 15, 1981

Menrose Caterers, Inc.
5602 11th Ave.
Brooklyn, NY 11219

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
Max Septimus
Louis J. Septimus & Company
350 Fifth Ave.
New York, NY 10001
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MENROSE CATERERS, 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 June 1, 1971 :
through August 31, 1975. :

Petitioner, Menrose Caterers, Inc., 5602 11th Avenue, Brooklyn, New York 11219, 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, 1971 through August 31, 1975 (File No. 14752).

A small claims hearing was held before Raymond Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 26, 1978 at 10:45 A.M., and continued on January 11, 1979 at 10:45 A.M. Petitioner appeared by Max Septimus, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales and use taxes due based on an examination of petitioner's available books and records.

FINDINGS OF FACT

1. Petitioner, Menrose Caterers, Inc., operated a catering business located on premises leased from a synagogue.
2. On April 2, 1976, 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 covering the period June 1, 1971 through August 31, 1975 for taxes due of \$10,305.68, plus penalty and interest of \$4,678.15, for a total of \$14,983.83.

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 December 20, 1976.

4. On audit, the Audit Division reconstructed petitioner's gross sales from bank deposit records which were the only records available other than a cash disbursements journal. The gross sales determined for the audit period were \$368,179.74 after adjustments for non-business deposits. The Audit Division instructed petitioner to retain sales invoices for the period March 1, 1975 through August 31, 1975 so that it could perform a test of nontaxable sales. Petitioner substantiated nontaxable sales of \$14,548.30 for said period. Petitioner did not submit invoices for taxable transactions. The Audit Division determined that petitioner's gross sales for the same period were \$33,686.39. Said amount included estimated sales of \$5,613.17 for April 1975 because petitioner showed no bank deposits for that month but had purchases of liquor, linen and perishable foods for April, 1975. The estimated sales were based on an average of March 1975 and May 1975 sales less an adjustment of 25 percent to reflect religious holidays during April. The Division computed a taxable sales ratio of 57 percent which was applied to gross sales for the audit period resulting in additional sales taxes due of \$10,144.53.

The Audit Division also found use taxes due of \$161.15 on expense purchases.

5. As the result of a pre-hearing conference, the Audit Division conceded that the additional sales taxes determined above should be adjusted to \$8,931.17 because the assessment of additional taxes was not timely with respect to the period June 1, 1971 through November 30, 1971. Petitioner executed a Withdrawal of Petition and Discontinuance of Case whereby it agreed to \$6,457.24 of the adjusted tax due, plus applicable penalties and interest leaving taxes of \$2,473.93 at issue.

The additional taxes agreed to by petitioner pursuant to the foregoing withdrawal were computed based on a taxable ratio of 48.2 percent as compared to 57 percent determined by the Audit Division. Petitioner arrived at the 48.2 percent in the same manner as the Audit Division except that it deleted the estimated sales for April 1975. Petitioner argued that the religious laws and traditions of the synagogue prohibited it from doing business from the 1st Day of Passover to 33 days thereafter and that such period in 1975 was during April.

Petitioner offered no substantial evidence to show that there were no sales in April 1975.

6. Petitioner failed to maintain sufficient books and records from which the Audit Division could determine the exact amount of taxable sales.

7. Petitioner did not establish that reasonable cause exists for the abatement of penalty and interest.

CONCLUSIONS OF LAW

A. That since petitioner failed to maintain adequate and complete books and records, the Audit Division properly determined petitioner's taxable sales and additional taxes due from such information as was available pursuant to section 1138(a) of the Tax Law. Matter of Chartair, Inc. v. State Tax Commission 65 AD2d 44.

B. That in accordance with Finding of Fact "5", the additional sales taxes due of \$10,144.53 are reduced to \$8,931.17.

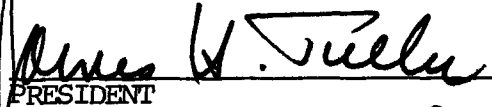
C. That the petition of Menrose Caterers, Inc. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use

Taxes Due issued April 2, 1976; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAY 15 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER