

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Philma Restaurant, Inc. (Purchaser) :

: 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 Years :  
12/1/71 - 8/31/74.

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 3rd day of July, 1981, he served the within notice of Decision by mail upon Philma Restaurant, Inc. (Purchaser), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philma Restaurant, Inc. (Purchaser)  
52-11 111th Street  
Corona, NY 11368

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  
3rd day of July, 1981.

Annie G. Haglund

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Philma Restaurant, Inc. (Purchaser) :

: 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 :  
Years 12/1/71 - 8/31/74.

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 3rd day of July, 1981, he served the within notice of Decision by mail upon Sidney Romash the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney Romash  
50 Court St.  
Brooklyn, NY 11201

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  
3rd day of July, 1981.

*James A. Haglund*

*J. Vredenburg*

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

July 3, 1981

Philma Restaurant, Inc. (Purchaser)  
52-11 111th Street  
Corona, NY 11368

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  
Sidney Romash  
50 Court St.  
Brooklyn, NY 11201  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
PHILMA RESTAURANT, INC. (PURCHASER)	:	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, 1971 through	:	
August 31, 1974.	:	

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Petitioner, Philma Restaurant, Inc., 52-11 111th Street, Corona, New York 11368, 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 August 31, 1974 (File No. 12863).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 19, 1978 at 9:25 A.M. Petitioner appeared by Sidney Romash, Esq. The Audit Division appeared by Peter Crotty, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

- I. Whether petitioner was a purchaser in a bulk sales transaction which made it liable for the seller's unpaid sales tax.
- II. Whether the Audit Division properly determined the sales taxes due from seller.

FINDINGS OF FACT

1. Petitioner, Philma Restaurant, Inc., filed a Notification of Sale, Transfer or Assignment in Bulk on July 25, 1974.

2. A Notice of Claim to Purchaser was issued against petitioner on September 27, 1974 under Bulk Sale Number BSQ 72,801.

3. A Notice and Demand for Payment of Sales and Use Taxes Due in the amount of \$65,000.00, plus \$17,700.00 in penalties and/or interest, for a total of \$82,700.00, was issued against petitioner on January 14, 1975. Thereafter, on January 28, 1976, a Notice of Assessment Review was issued revising the sales and use tax to \$38,726.46, the interest to \$6,678.09, and the total due to \$45,404.55.

4. Petitioner filed a timely perfected petition.

5. On July 16, 1974, petitioner purchased from Longchamps, Inc., a restaurant located at 1117 Third Avenue, New York, New York. At the time of purchase, this particular restaurant was not in operation. On July 25, 1974, petitioner filed the abovementioned Notification of Sale, Transfer or Assignment in Bulk listing the "total sales price of business or property" as \$92,500.00, the "sales price of furniture, fixtures, etc." as \$15,000.00, and the "amount of escrow fund" as \$5,000.00. On October 17, 1974, petitioner submitted payment of \$1,200.00 for the sales tax on the said fixtures.

6. At the time of the sale, the seller, Longchamps, Inc., owned 14 other restaurants besides the one sold to petitioner.

7. Longchamps, Inc. subsequently filed for bankruptcy under Chapter XI. It owed sales taxes on the operations of all of its restaurants.

8. On June 30, 1975, the Audit Division conducted an audit of Longchamps, Inc.'s sales tax returns, general ledgers, purchase invoices and construction ledgers for the audit period December 1, 1971 through August 31, 1974. The books and records of Longchamps, Inc. were inadequate to determine its exact tax liability. The vendor objected to a markup test, as an audit had been

completed less than two years earlier. Since the book markup in the prior audit had been accepted, it was agreed to accept the book markup in the audit for the period at issue without any test being performed. Gross sales per books were reconciled with gross sales per returns filed. It was found that there was a total of underreported sales of \$101,382.50, which included a disallowed bad debt deduction of \$89,693.11. The tax due on the underreported sales amounted to \$7,096.77. The vendor failed to report and charge tax on service charges of \$40,762.16. The tax on this amounted to \$2,853.36. The margin of error on tax charged per prior audit was .3 percent. It was agreed to accept this percentage for the current audit and this overcollection charge amounted to \$6,088.58. Fixed assets purchases were examined in detail for the entire audit period. The tax due on fixed assets purchases without tax amounted to \$22,687.75. The total tax due as a result of the above audit amounted to \$38,726.46. The tax pertained to all Longchamps Inc.'s 15 restaurants.

9. At the hearing, the Audit Division conceded that the assessment for the restaurant at issue should be \$5,892.49. Said amount was derived from the service charges (\$2,490.05), unproved bad debt deductions (\$3,139.26), and overcollections (\$263.18).

#### CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in pertinent part:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale..."

B. That the transaction whereby petitioner, Philma Restaurant, Inc. purchased a restaurant from Longchamps, Inc. consists of a part of the bulk

(the 15 restaurants). Therefore, the purchase of the said restaurant is a "bulk sale" within the meaning and intent of section 1141(c) of the Tax Law.

C. That since petitioner was a purchaser in a "bulk sale" transaction and was properly and timely assessed by the Audit Division, it is liable for the seller's unpaid taxes pursuant to 1141(c) of the Tax Law.

D. That the audit procedures used by the Audit Division to determine Longchamps, Inc.'s sales for the taxable period in question were proper, under section 1138(a) of the Tax Law.

E. That the petition of Philma Restaurant, Inc. is granted to the extent indicated in Finding of Fact "9" above; that the Audit Division is hereby directed to further modify the Notice and Demand for Payment of Sales and Use Taxes Due issued January 14, 1975; that the recomputed tax due shall be together with interest computed at the minimum statutory rate; and that, except as so modified, the petition is in all other respects denied.

DATED: Albany, New York

JUL 03 1981

STATE TAX COMMISSION

*James G. Tully*  
PRESIDENT

*Thomas H. L. C.*  
COMMISSIONER

*Francis R. Koenig*  
COMMISSIONER