

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Ramayana Indonesian Restaurant of NY Inc. :  
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: :  
3/1/74- 2/28/77. :

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AFFIDAVIT OF MAILING

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Ramayana Indonesian Restaurant of NY Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

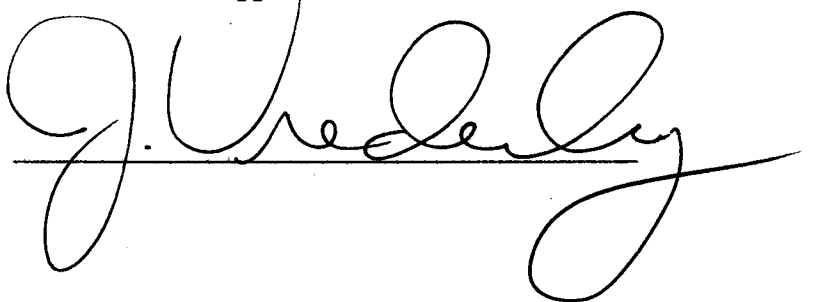
Ramayana Indonesian Restaurant of NY Inc.  
123 W. 52nd St.  
New York, NY 10019

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  
30th day of October, 1981.





STATE OF NEW YORK  
STATE TAX COMMISSION

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Ramayana Indonesian Restaurant of NY Inc. :  
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AFFIDAVIT OF MAILING

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Richard L. Gold the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard L. Gold  
Bandler & Kass  
605 Third Ave.  
New York, NY 10016

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  
30th day of October, 1981.

*Annie G. Haglund*

*J. Vredenburg*

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

October 30, 1981

Ramayana Indonesian Restaurant of NY Inc.  
123 W. 52nd St.  
New York, NY 10019

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  
Richard L. Gold  
Bandler & Kass  
605 Third Ave.  
New York, NY 10016  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
RAMAYANA INDONESIAN RESTAURANT OF N.Y., INC.  
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 March 1, 1974  
through February 28, 1977.

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DECISION

Petitioner, Ramayana Indonesian Restaurant of N.Y., Inc., 123 West 52nd Street, New York, New York 10019, 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 March 1, 1974 through February 28, 1977 (File No. 23589).

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 February 25, 1981 at 10:45 A.M. Petitioner appeared by Richard Gold, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether gross sales recorded in petitioner's books and records which are in excess of gross sales reported on its sales tax return for the period December 1, 1976 through February 28, 1977 are subject to tax.

II. Whether the Audit Division properly disallowed petitioner's reported nontaxable sales.

III. Whether the markup test performed by the Audit Division accurately determined additional sales taxes due from petitioner.

IV. Whether petitioner is liable for sales taxes collected from customers which was in excess of the applicable tax rate.

V. Whether petitioner is liable for tax on certain purchases of furniture and fixtures, leasehold improvements and expense items.

VI. Whether equipment rented by petitioner from its parent company is subject to sales and use taxes.

#### FINDINGS OF FACT

1. Petitioner, Ramayana Indonesian Restaurant of N.Y., Inc., a wholly-owned subsidiary of Indonesian Enterprises, operated a restaurant located at 123 West 52nd Street, New York, New York. Petitioner also had a bar on the premises; however, it was primarily a dining establishment specializing in Indonesian cuisine.

2. On November 18, 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 covering the period March 1, 1974 through February 28, 1977 for taxes due of \$17,650.50, plus penalty and interest of \$7,922.10, for a total of \$25,572.60.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue, to June 19, 1978.

4. On audit, the Audit Division found that gross sales recorded in petitioner's general ledger exceeded gross sales reported on the sales tax return filed for the period December 1, 1976 through February 28, 1977 by \$12,207.39. The Audit Division asserted tax of \$976.59 on the excess gross sales.

The Division disallowed petitioner's reported nontaxable sales of \$51,894.98, on the basis that there were no exemption certificates on file, resulting in additional taxes due of \$4,104.35.

A markup test was performed for liquor, wine and beer, using purchases for the months of October 1976 and November 1976. The test revealed a beer

markup of 257 percent and a combined liquor and wine markup of 452 percent, or an overall weighted average markup of 402 percent. Said markup was applied to total liquor, wine and beer purchases for the audit period to determine sales of \$514,422.69. Petitioner reported beverage sales of \$415,823.06, leaving additional sales of \$98,599.63 and tax due thereon of \$7,766.53. The liquor markup was computed using a 1½ ounce serving of liquor (3 ounces for rum drinks).

Petitioner's food sales were accepted as being correct based on a reported markup of 197 percent.

Petitioner rounded sales tax collected (up and down) to the nearest nickel. A review of two days guest checks disclosed an overcollection error factor of .7 percent resulting in sales tax overcollections of \$822.93 for the entire audit period.

Use taxes were asserted as follows:

furniture and fixtures	\$ 110.25
leasehold improvements	285.99
expense purchases	361.43
equipment rental	3,222.45

The tax determined on expense purchases was based on a test period of June 1, 1976 through August 31, 1976.

The equipment rental referred to above represents equipment leased to petitioner by its parent company, Indonesian Enterprises, Inc. Equipment rental charges for the audit period amounted to \$193,750.00, of which \$40,687.50 or 21 percent was determined taxable.

5. Petitioner argued that the difference between gross sales per books and gross sales reported on the sales tax return for the period December 1, 1976 through February 28, 1977 was sales tax extracted from bar receipts which it considered part of the price for a drink sold at the bar. However, the bar

sales for said period of \$28,596.95 divided by 1.08 percent equals \$26,478.66 or a sales tax of \$2,118.29. Therefore, the foregoing argument does not account for the discrepancy of \$12,207.39.

6. The Audit Division failed to establish that guest checks and invoices for expense purchases were not available to conduct a complete audit and determine the exact amount of tax overcollected and tax due on expense purchases for the audit period.

7. Petitioner submitted several exemption certificates (Certificate of Diplomatic and Consular Tax Exemption) which were issued to petitioner subsequent to the audit. Petitioner did not attempt to relate said certificates to specific nontaxable sales made during the audit period.

8. Petitioner had a daily "happy hour" between 5 p.m. and 8 p.m. when during such time drinks in the bar were sold at reduced prices.

Petitioner used 2 ounces of liquor in certain drinks, (i.e. martinis and manhattans).

9. The Audit Division erroneously considered some purchases of vermouth were sold as an individual drink (1½ ounce per drink) when vermouth was actually used as a mixer.

10. Petitioner made extraordinary purchases of vodka during the test months which has a higher markup than the average liquor.

11. Petitioner offered substantial evidence to show that sales tax was paid on the furniture, fixtures and leasehold equipment in issue at the time of purchase. Petitioner did not pay tax on a cutter purchased for \$122.50.

Petitioner failed to establish that sales tax was paid on the expense purchases or that sales tax was not applicable on such purchases.

12. Petitioner argued that the charges for equipment rental referred to in Finding of Fact "4" were merely bookkeeping entries between petitioner and its parent company and that it did not make any payments to the parent.

13. Petitioner acted in good faith at all times.

#### CONCLUSIONS OF LAW

A. That petitioner failed to sustain the burden of proof required by section 1132(c) of the Tax Law to establish that the difference of \$12,207.39 between gross sales recorded in its books and records and such sales reported on the sales tax return filed for the period December 1, 1976 through February 28, 1977 were not subject to tax. Accordingly, petitioner is liable for the tax of \$976.59 pursuant to section 1133(a) of the Tax Law.

B. That petitioner also failed to sustain the burden of proof required by section 1132(c) of the Tax Law with respect to its reported nontaxable sales, and therefore, such sales were properly disallowed by the Audit Division.

C. That the markup test conducted by the Audit Division did not give consideration to the factors set forth in Findings of Fact "8", "9" and "10" and thereby overstated petitioner's overall markup percentage. That petitioner's books and records showing a markup of 306 percent reflect the actual sales of liquor, wine and beer for the period at issue. Accordingly, the additional taxes of \$7,766.53 determined as a result of the markup test are cancelled.

D. That petitioner computed the sales tax reported on sales tax returns filed by applying the applicable tax rate to taxable sales and thus has remitted the tax undercollected from its customers; however, petitioner is liable for taxes collected from customers in excess of the actual tax rate, pursuant to section 1137(a)(iii) of the Tax Law. However, since there was no evidence that petitioner's guest checks were incomplete, the Audit Division's use of a test



period to estimate sales tax overcollections for the entire audit period is unauthorized, Matter of Chartair, Inc. v. State Tax Commission, 65 AD 2d 44. Accordingly, the overcollections are reduced to \$1.54, the actual amount found for the test period.

E. That based on Finding of Fact "11", the use taxes of \$396.24 on furniture, fixtures and leasehold improvements are reduced to \$9.80. That petitioner is liable for tax on expense purchases in accordance with the provisions of section 1133(b) of the Tax Law. However, since the Audit Division failed to establish a foundation for the use of a test period to determine petitioner's liability on such purchases, the taxes due are reduced to \$31.20, Matter of Chartair, Inc. v. State Tax Commission, 65 AD 2d 44.

F. That the inter-corporate transactions for the rental of equipment between petitioner and its parent company, Indonesian Enterprises, Inc., constituted retail sales within the meaning and intent of section 1101(b)(4) of the Tax Law and therefore, are subject to the tax imposed under sections 1105(a) and 1110 of the Tax Law.

G. That the penalty is abated and interest shall be computed at the minimum statutory rate.

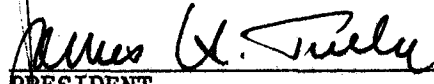
H. That the petition of Ramayana Indonesian Restaurant of N.Y., Inc. is granted to the extent that the additional sales and use taxes due are reduced to \$8,345.93 so as to conform with the Conclusions of Law above; that the Audit Division is hereby directed to modify the Notice of Determination and Demand

for Payment of Sales and Use Taxes Due issued November 18, 1977; and that,  
except as so granted, the petition is in all other respects denied.

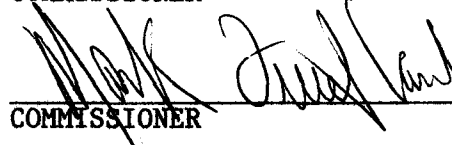
DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER