

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Garry Ryan

:

:

: 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 Periods 12/74-11/75,3/76-5/76. :

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

Garry Ryan
RD #5, Apt. 11
Bailey Lakes
Ashland, OH 44805

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 April, 1981.

Conna A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Garry Ryan :
: 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 Periods 12/74-11/75, 3/76-5/76. :

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 3rd day of April, 1981, he served the within notice of Decision by mail upon Cyrus C. Trossman 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. Cyrus C. Trossman
Trossman & Trossman
627 Brisbane Bldg.
Buffalo, NY 14203

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 April, 1981.

Carmine A. Haglund

J. Vredenburg

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

April 3, 1981

Garry Ryan
RD #5, Apt. 11
Bailey Lakes
Ashland, OH 44805

Dear Mr. Ryan:

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
Cyrus C. Trossman
Trossman & Trossman
627 Brisbane Bldg.
Buffalo, NY 14203
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
GARRY RYAN : DECISION
for Revision of a Determination or :
for Refund of Sales and Use Taxes :
under Articles 28 and 29 of the Tax :
for the Periods December 1, 1974 :
through November 30, 1975 and March 1, :
1976 through May 31, 1976.

Petitioner, Garry Ryan, RD #5, Apt. 11, Bailey Lakes, Ashland, Ohio 44805, 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 periods December 1, 1974 through November 30, 1975 and March 1, 1976 through May 31, 1976 (File No. 20379).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on September 30, 1980 at 9:15 A.M. Petitioner appeared by Cyrus C. Trossman, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner was a "person required to collect tax" pursuant to sections 1131(1) and 1133(a) of the Tax Law, with regard to the Cousins Three Restaurant.

FINDINGS OF FACT

1. On June 28, 1977 the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against Gary (sic) Ryan for the periods December 1974 through November 1975 and March 1976 through May 31, 1976 in

the amount of \$22,050.32 in tax due plus penalty and interest on the grounds that he was personally liable as an officer of Pro-Am Restaurant, Inc., ("Pro-Am") 6199 Transit Road, Depew, New York, which operated the Cousins Three Restaurant.

2. In 1974 petitioner entered into an agreement with two other individuals to form Pro-Am and to operate the restaurant called Cousins Three. The other individuals were Elwin Dalley, who was to be the director and who had the final say in all functions, and, Frank E. Bork, a "silent partner". Petitioner was the working manager. All had a one-third share in the corporation. After a few months of operation the business got into financial difficulty. Elwin Dalley finally asked petitioner to take over the handling of the business and the books. Checks still had to have Dalley's approval. Petitioner supervised the kitchen, dining room and the bar, trained personal, ordered foods, dealt with deliveries and the daily check-out. In September 1976 Elwin Dalley resigned due to the financial loss suffered by the enterprise. Petitioner and Frank Bork continued to operate the restaurant. By year's end they realized that they would have to sell out and finally closed the doors on January 13, 1977. The franchise tax report for 1975 showed total receipts of \$261,876.40, net income indicated a loss of \$63,801.86; depreciation was \$23,167.00. Petitioner signed the September 1, 1975 through November 30, 1975 sales tax return. Said return was later amended by Elwin Dalley; the tax was not paid. Petitioner had knowledge during the operation of the business that the president and co-owner, Elwin Dalley, was not paying State and Federal taxes. This practice was continually questioned by petitioner and the "silent partner", Frank E. Bork.

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CONCLUSIONS OF LAW

A. That section 1131(1) of the Tax Law Provides:

"Persons required to collect tax' or 'persons required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services;...Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

B. That section 1133(a) of the Tax Law provides that "...every person required to collect any tax imposed...shall be personally liable for the tax imposed, collected or required to be collected;..."

C. That petitioner, Garry Ryan, was a one third stock owner, an officer and a working manager of Pro-Am Restaurants, Inc. and was a person required to collect tax. He was under duty to act for said corporation in compliance with Articles 28 and 29 of the Tax Law.

D. That the petition of Garry Ryan is denied and the notices and demand for payment of sales and use taxes due issued June 28, 1977 are sustained.

DATED: Albany, New York

APR 03 1981

STATE TAX COMMISSION

James H. Tella
PRESIDENT

Thomas H. Spill
COMMISSIONER

Francis R. Koenig
COMMISSIONER

