

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Corporate Food Services, Inc. :
and Jack Galione :

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 :
6/1/74-5/31/77. :

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 6th day of October, 1982, he served the within notice of Decision by certified mail upon Corporate Food Services, Inc., and Jack Galione the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

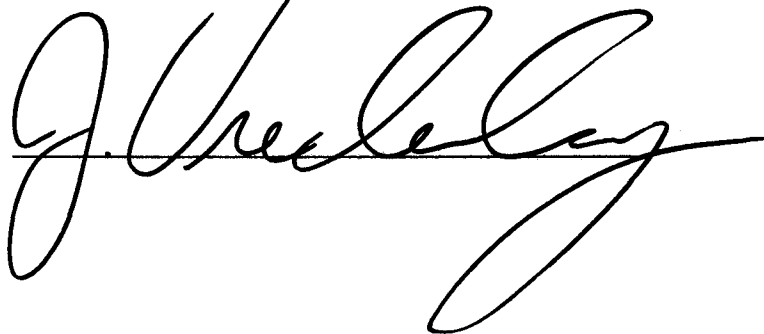
Corporate Food Services, Inc.
and Jack Galione
1 Battery Park Plaza
New York, NY 10004

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
6th day of October, 1982.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

A large, stylized handwritten signature in dark ink, likely belonging to Jay Vredenburg, is written over a horizontal line. The signature is fluid and cursive, with a large initial 'J' and a long, sweeping tail.

STATE OF NEW YORK

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Corporate Food Services, Inc.	:	
and Jack Galione	:	AFFIDAVIT OF MAILING
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of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 6/1/74-5/31/77.	:	

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 6th day of October, 1982, he served the within notice of Decision by certified mail upon Richard J. Hiegel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

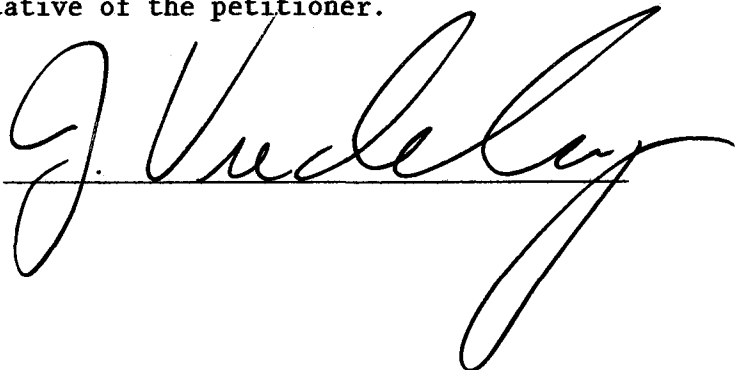
Richard J. Hiegel
Cravaith, Swaine & Moore
One Chase Manhattan Plaza
New York, NY 10005

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
6th day of October, 1982.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Corporate Food Services, Inc. :
and Jack Galione :

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 6/1/74-5/31/77. :

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 6th day of October, 1982, he served the within notice of Decision by certified mail upon Jack Galione, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

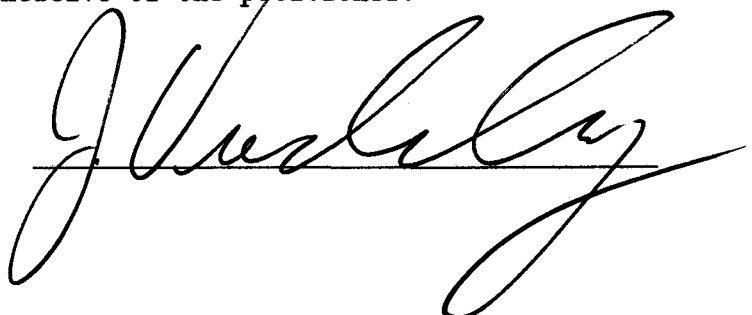
Jack Galione
245 E. 63rd St.
New York, NY

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
6th day of October, 1982.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

October 6, 1982

Corporate Food Services, Inc.
and Jack Galione
1 Battery Park Plaza
New York, NY 10004

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Richard J. Hiegel
Cravaith, Swaine & Moore
One Chase Manhattan Plaza
New York, NY 10005
and
Jack Galione
245 E. 63rd St.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CORPORATE FOOD SERVICES, 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 June 1, 1974
through May 31, 1977.

DECISION

In the Matter of the Petition
of
JACK GALIONE
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, 1974
through May 31, 1977.

Petitioners, Corporate Food Services, Inc., 1 Battery Park Plaza, New York, New York 10004 and Jack Galione, 245 East 63rd Street, New York, New York, filed petitions for revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period June 1, 1974 through May 31, 1977 (File Nos. 22253 and 22254).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 7, 1981 at 9:45 A.M. Petitioners appeared by Cravath, Swaine & Moore, Esqs. (Richard J. Hiegel, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the petitioners timely filed perfected petitions for revision of a determination or for refund of sales and use taxes.

II. Whether petitioner Jack Galione's liability for so much of the taxes in issue herein for the periods ending February 28, 1975 and prior thereto were barred by the statute of limitations.

III. Whether the Audit Division properly determined petitioners' sales and use tax liability for the period June 1, 1974 through May 31, 1977.

IV. Whether petitioners should receive a credit or refund for sales taxes paid on certain paper products distributed to clients in the course of petitioners' food service business.

V. Whether penalty and interest in excess of the statutory minimum should be waived.

FINDINGS OF FACT

1. On April 3, 1978, the Audit Division issued notices of determination and demand for payment of sales and use taxes due against petitioners, Corporate Food Services, Inc. ("CFS") and Jack Galione, president of CFS, individually as a person required to collect and pay over the tax, in the amount of \$357,709.96, plus penalty and interest in the sum of \$142,995.61, for a total due of \$500,705.57 for the period June 1, 1974 through May 31, 1977.

2. Petitioner CFS by Jack Galione, president, executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1974 through May 31, 1977 to September 20, 1978. Petitioner Jack Galione did not execute a consent extending the period of limitation as to his personal liability.

3. Petitioner Jack Galione as president of CFS was a person required to collect tax during the period in issue.

4. On July 3, 1978 petitioners filed their perfected petitions by certified mail, return receipt requested.

5. During the periods in issue, CFS operated employee cafeterias and dining rooms on a contractual basis for a number of clients in New York City and Westchester County. CFS also serviced food vending machines for its clients. CFS provided the personnel to prepare and serve the food in these dining facilities, to maintain the equipment, clean the facilities and perform the administrative work involved.

6. The cafeterias and dining rooms operated by CFS were located on the premises of the various clients. In addition to providing the premises, the client furnished all the kitchen equipment and utensils, selected the menus, determined the hours of operation, quality of food to be served and the prices to be charged.

7. CFS's responsibilities according to its contract with one of its clients, Cravath, Swaine & Moore, included:

"general supervision, hiring, training of personnel, the purchasing, preparation and servicing of food products, confections, other edibles and beverages on the premises, and the purchasing of the necessary operating supplies such as but not limited to paper goods and cleaning supplies, and obtaining laundry services. CFS at all times will maintain an adequate staff of its employees on duty at the premises for efficient operation, and will provide expert administrative, dietetic, purchasing, equipment, consulting and personnel advice and supervision."

8. CFS purchased the food and drink consumed in the clients' cafeterias and dining rooms. These purchases were made on behalf of the client and owned by the client. Food was delivered directly to the client's premises and any unconsumed food remained on the premises as part of the client's food inventory.

9. In return for the food services, clients paid CFS a management fee which was a stated dollar amount and an administrative services fee determined according to a sliding scale of percentages of sales. The client also reimbursed CFS for its direct operating costs (cost of food and drink purchased, salaries

of CFS employees, insurance, other labor costs, cleaning, supplies, linen service, etc.) to the extent that these costs exceeded income from sales. These fees and reimbursements were billed to the client on a monthly basis.

10. CFS collected sales tax on the sales price charged to the employees for meals. CFS, however, did not collect sales tax with respect to the fees and cost reimbursements paid by the client firms.

11. CFS paid sales tax on certain purchases made during the period in question. Included in these purchases were paper products consisting of cups, plates, straws and napkins. These items were transferred to individual employees who bought meals in the cafeterias and dining rooms. The auditor did not give credit for sales tax paid on these items. CFS contends that such purchases of paper products were for resale and thus not subject to sales tax.

12. In computing the amount of sales tax due on expense purchases made by CFS, the Audit Division used a test period of the month of May, 1977 and the results were projected for the entire taxable period. No evidence was presented indicating that the books and records of CFS were inadequate for this period.

13. The Audit Division contends that food service management receipts for fees and cost reimbursements are taxable under section 1105(d)(i) of the Tax Law.

14. Following the formal hearing, the petitioners conceded tax liability for \$7,994.00 attributable to undercollection of sales taxes on individual meals. Petitioners, therefore, requested a redetermination only as to \$329,856.00 in tax and \$126,767.00 in interest and penalties.

15. Petitioners acted in good faith at all times and there was no intent to evade the tax.

CONCLUSIONS OF LAW

A. That the date of the United States postmark stamped on the return receipt of certified mail is the date of service under section 601.13(a)(1) of the State Tax Commission Rules of Practice and Procedure. Accordingly, the petitioners timely filed their perfected petition.

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

The term "person required to collect tax" is defined in section 1131(1) of the Tax Law to include "any officer or employee of a corporation... who is under a duty to act for such corporation in complying with any requirement of this article."

C. That section 1147(c) of the Tax Law provides that prior to the expiration of the period for the assessment of additional tax, a taxpayer may consent in writing to an extension of the period within which additional tax due may be determined. Such consent by a corporation extends the liability of its corporate officers required to collect tax under sections 1131(1) and 1133(a) of the Tax Law for the period consented to by the corporation. Therefore, since CFS signed a consent to an extension, the liability of its president, Jack Galione, was extended for the same period to the extent of any resulting liability of CFS.

D. That section 1105(d)(i) of the Tax Law provides that there shall be a tax paid upon "(t)he receipts from every sale of food and drink of any nature, or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers."

E. That the amounts received by CFS from clients under the reimbursed cost and management fee arrangements are sales of food and drink within the meaning and intent of the statute. Section 1105(d)(i) "is unambiguous and is applicable to the petitioner's method of supplying food and drink. There is no distinction to be drawn between petitioner's billing of food components as opposed to entire meals... Petitioner's operation is analogous to a caterer's and constitutes a sale." (Stouffer Management Food Service, Inc. v. Tully, 415 N.Y.S.2d 559, 560 (Sup. Ct. 1978) aff'd 414 N.Y.S.2d 948 (App. Div. 1979).)

F. That in computing unpaid sales tax on expense purchases, the Audit Division's resort to a one-month test was unwarranted in the absence of evidence that petitioner maintained inadequate books and records. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44 (1978).) Therefore, the tax due on purchases is reduced to the amount due on purchases for the test month of May, 1977 totalling \$479.48.

G. That paper products used as containers which are transferred to customers fall within the resale exclusion of section 1101(b)(4)(i)(A) of the Tax Law (Servomation Corp. v. State Tax Commission, 435 N.Y.S.2d 686 (Ct. App. 1980); Burger King, Inc. v. State Tax Commission, 435 N.Y.S.2d 689 (Ct. App. 1980)). Accordingly, petitioners are entitled to a credit or refund for any sales tax paid on purchases of paper containers (cups, plates, wrappers) intended for transfer to customers.

H. That straws, napkins and any other non-container paper product purchases do not fall within the resale exclusion of section 1101(b)(4)(i)(A) of the Tax Law and are subject to tax (Burger King, supra; Servomation, supra).

I. That penalty and interest in excess of the minimum prescribed by section 1145(a) of the Tax Law are waived.

J. That the petitions of Corporate Food Services, Inc. and Jack Galione are granted to the extent indicated in Conclusions of Law "A", "F", "G" and "I" above. That the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued April 3, 1978. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 06 1982

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER