

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Carmine Lombardi :
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 9/1/75 - 8/31/76. :
AFFIDAVIT OF MAILING

State of New York
County of Albany

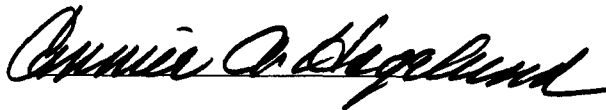
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of September, 1982, he served the within notice of Decision by certified mail upon Carmine Lombardi, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

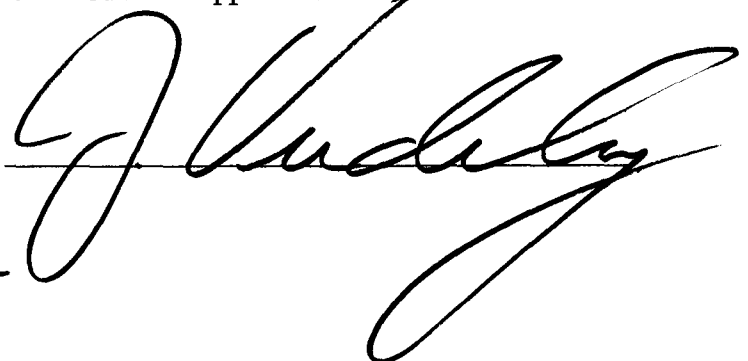
Carmine Lombardi
724 Todt Hill Rd.
Staten Island, NY 10314

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
8th day of September, 1982.





ADMINISTRATOR
STATE TAX COMMISSION
STATE OF NEW YORK

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Carmine Lombardi :

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 9/1/75 - 8/31/76. :

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 8th day of September, 1982, he served the within notice of Decision by certified mail upon Donald Israel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald Israel
150 Great Neck Rd.
Great Neck, NY 11021

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
8th day of September, 1982.

Bennie A. Hagelund

J. Vredenburg

NOTARY PUBLIC
JAY VREDEBURG
NOTARY PUBLIC
STATE OF NEW YORK

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

September 8, 1982

Carmine Lombardi
724 Todt Hill Rd.
Staten Island, NY 10314

Dear Mr. Lombardi:

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
Donald Israel
150 Great Neck Rd.
Great Neck, NY 11021
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| CARMINE LOMBARDI | : | 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 September 1, | : | |
| 1975 through August 31, 1976. | : | |

Petitioner, Carmine Lombardi, 724 Todt Hill Road, Staten Island, New York 10314, 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 September 1, 1975 through August 31, 1976 (File No. 16549).

Petitioner has waived a hearing and submits his case for decision by the State Tax Commission based on the record as it exists. After due consideration of the record, the Commission renders the following decision.

ISSUE

Whether petitioner was a person required to collect and pay over sales taxes on behalf of Ambrose Coppotelli, Inc., [d/b/a Tavern On The Green] within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the periods at issue herein.

FINDINGS OF FACT

1. On August 30, 1976, a Notice and Demand for Payment of Sales and Use Taxes Due was issued to petitioner, Carmine Lombardi, for the following periods and in the following amounts:

| <u>Period Ended</u> | <u>Tax</u> | <u>Penalty & Interest (to 9/20/76)</u> |
|---------------------|--------------------|--|
| 11/75 | \$14,125.08 | \$3,107.52 |
| 2/76 | 12,275.08 | 1,964.01 |
| 5/76 | 14,118.11 | 1,411.81 |
| | <u>\$40,518.27</u> | <u>\$6,483.34</u> |
| Total = | | <u>\$47,001.61</u> |

2. A Notice of Determination and Demand, also issued to petitioner on August 30, 1976, covered the period ended August 1976, and asserted sales tax due in the amount of \$15,000.00 with no penalty or interest being charged.

3. Listed directly beneath the caption bearing petitioner's name and address on both of the above notices was the following legend:

"RE: Ambrose Coppotelli, Inc.
d/b/a Tavern On The Green"

4. Petitioner, Carmine Lombardi, filed a petition and a power of attorney, and by a letter dated December 5, 1978, through his representative, agreed to submit his case for decision by the State Tax Commission without a hearing.

5. "Tavern On The Green" (hereinafter "the Restaurant") was the popular, trade or operating name of a restaurant located at 2566 Hylan Boulevard, Staten Island, New York, and operated by Ambrose Coppotelli, Inc.

6. According to an affidavit filed by petitioner, he and one Phil Fitzpatrick intended to purchase the Restaurant from one George Spanos. This purchase was, however, expressly contingent upon the written consent of Dominick and Frank Coppotelli and Ambrose Coppotelli, Sr., to the transfer of the stock of Acovos Corporation and Ambrose Coppotelli, Inc., in conjunction with the sale of the Restaurant.

7. Pending transfer of the stock, consent for which was ultimately never given, petitioner and his intended partner, Mr. Fitzpatrick, entered the Restaurant for the purpose of "familiarizing themselves" with its operation.

8. Petitioner states, in his affidavit, that during the time he and Mr. Fitzpatrick were familiarizing themselves with the operation of the Restaurant, they were in constant communication with Mr. Spanos as owner of the Restaurant.

9. Petitioner further claims he was never responsible for running the Restaurant, paying bills, or preparing, filing or paying taxes on behalf of the Restaurant, nor did he sign any tax returns for the Restaurant.

Petitioner asserts he was never an officer, director or stockholder in Ambrose Coppotelli, Inc., nor did he have authority to hire or fire employees, control the company's financial affairs, nor decide which bills to pay or when to pay them. No evidence other than petitioner's affidavit was presented in support of the foregoing assertions.

10. New York State and Local Sales and Use Tax Returns (Forms ST-100) filed, but with no payment enclosed by Ambrose Coppotelli, Inc., for the periods ended November 1975 through May 1976, showed sales tax due in amounts identical to the amounts shown on the Notices of Determination and Demand issued for those periods. These returns were neither signed nor dated. In addition there was no return filed for the period ended August 1976.

11. Petitioner was given, by means of a corporate resolution, the authority to sign checks on the accounts of the Restaurant. Petitioner states this was only as an accomodation and that he only remembers signing 5 or 6 checks strictly as an accomodation in instances when George Spanos and/or the Restaurant's bookkeeper, one Ann LoNigro, were unavailable to sign. Several checks appear in the file; four of which bear Ann LoNigro's signature and seventeen of which bear an illegible signature.

12. A dinner theatre production agreement between the Restaurant and "Dinner Theatre International" was signed on behalf of the Restaurant by petitioner, Carmine Lombardi. Also, a catering agreement between "Le Jungle" (a private club) and the Restaurant, though unsigned, bore a signature line

indicating the Restaurant was to be bound by the signature of petitioner, Carmine Lombardi.

13. Petitioner did not produce a copy of the original agreement to purchase the Restaurant, but only a copy of an agreement dated October 1975 stating it was a supplement to the original agreement to purchase dated June 1975. This supplemental agreement was silent as to any aspects of when or if petitioner would assume control of the Restaurant, and what his pre-purchase responsibilities would be.

14. An interoffice memorandum from the Audit Division's New York District Office Warrant and Collection Section dated September 15, 1976, contains information, in contrast to petitioner's affidavit, that Mr. Lombardi was the manager and was operating the Restaurant, was authorized to enter into agreements for the restaurant, and was observed making a cash distribution of payroll subsequent to seizure and closing of the premises by agents of the State Department of Taxation and Finance.

CONCLUSIONS OF LAW

A. That section 1131(1) of the Tax Law includes among those persons required to collect sales and use taxes "...any officer or employee of a corporation... who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article (Article 28)...". Section 1133(a) of the Tax Law further provides "...every person required to collect any tax imposed by this article (Article 28) shall be personally liable for the tax imposed, collected or required to be collected under this article (Article 28).".

B. That the resolution of whether an individual is a person required to collect tax turns upon a factual determination in each case. Vogel v. Department

of Taxation and Finance, 98 Misc. 2d 222. Relevant factors in this determination include, but are not limited to the person's day to day responsibilities and involvement with the financial affairs and management of the corporation, the authority to sign checks on the corporation's accounts, and to prepare and sign tax returns for the corporation. Also whether the person has authority to determine which corporate bills to pay and when to pay them, to pay corporate bills with cash, and to keep books or financial records of any kind. Id., See also Chevlowe v. Koerner, 95 Misc. 2d 388; and 20 NYCRR 526.11(b)(2) and examples cited therein.

C. That petitioner, Carmine Lombardi, was a person under a duty to collect, truthfully account for and pay over sales and use taxes within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law for the periods at issue herein.

D. That the petition of Carmine Lombardi is hereby denied and the Notice and Demand covering the periods ended November 1975 through May 1976 is sustained as is the Notice of Determination and Demand covering the period ended August 1976.

DATED: Albany, New York

SEP 08 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER